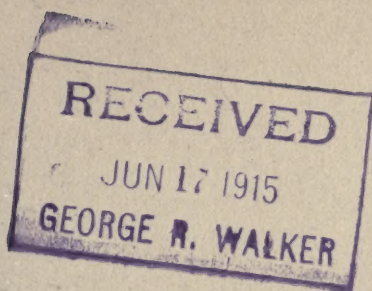




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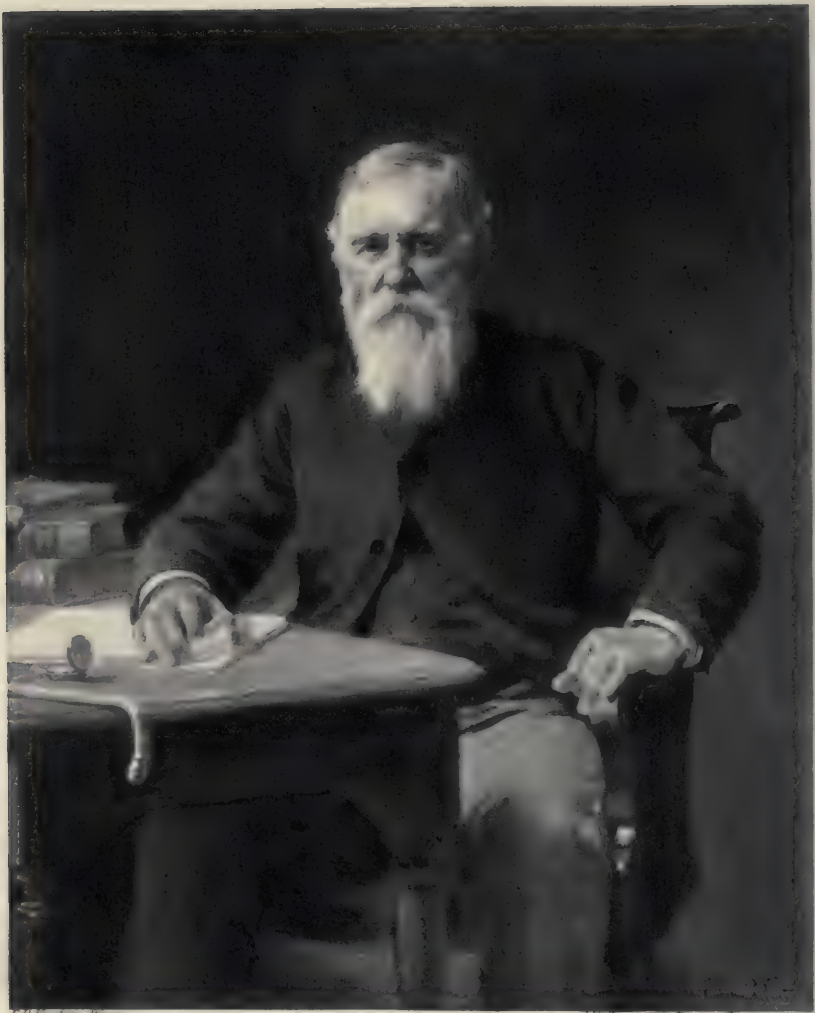
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PROFESSOR LANGDELL—A VIEW OF HIS CAREER.¹

THE death of Professor Christopher Columbus Langdell, at the age of eighty, terminates a career which is singularly complete and triumphant, and which must receive careful attention in any history of law or of education. Born in 1826, in the little New Hampshire village of New Boston, he was educated, largely by means of money he himself earned, at Phillips Exeter Academy, Harvard College, and the Harvard Law School. Thereafter for nearly twenty years he practised law in New York, known to few besides the lawyers by whom he was largely employed. It was not until 1870, when he had reached the age of forty-four, that he found his great opportunity. In that year he became Dane Professor of Law and Dean of the Law Faculty of Harvard University; and from that time until now there has been a Langdell system of study, and to describe or attack or defend that system has been one of the most frequent undertakings of law students and of law teachers. For a generation no professor's name has been more widely known. Lately the discussions have been less heated, and perhaps less numerous, than formerly; but even now the question most often and most pressingly asked as to any law school is whether it uses the Langdell system. Professor Langdell himself spent no time in disputation. He simply devised the system, used it, and was content to let results test the correctness of his theory.

To introduce a new system of study at the Harvard Law School in 1870 was an act of great bravery. The school had been in

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existence for half a century. It was in great repute. Its professors had produced treatises which held, and still hold, a high place in the esteem of the profession. Even laymen have heard of the works of Story, Greenleaf, Parsons, and Washburn. Those productions had been largely the fruit of class-room lectures. By the method of instruction then current the student listened to lectures and read treatises; and, in order that the task might not be merely the memorizing of generalizations made by the lecturer or the text-writer, some instructors devoted much time to discussing concrete problems. Many men are still living who know that the work of those old days must not be treated disrespectfully; but Professor Langdell, though trained in the method then current, was of opinion that he knew a method more scientific, more thorough, and better fitted to produce successful lawyers. He knew — as, indeed, every law student learns in the first week of his studies — that the existence and limits of a rule of law must be proved finally, not by a text-book, but by the reported decisions of courts. He knew that when a lawyer has occasion to test a rule of law he searches for those decisions. Professor Langdell determined that the student should be trained to use those original authorities, and to derive from judicial decisions, by criticism and comparison, the general propositions which text-writers, if they do their work conscientiously, find in the same manner, — that, in other words, the student should not be fed with predigested food. The plan, as worked out, was that the instructor should reprint from the reports the cases adapted to show the growth of legal doctrine; that the student should master five or six cases in preparation for each class-room exercise; and that the exercise should consist of stating and discussing these cases and solving related hypothetical problems. However easy it may be to-day to see that this plan is reasonable, in 1870 it appeared to many persons, and indeed to most, impracticable and unscientific. The fact seems to be that this was an extremely early attempt to apply the inductive method of the laboratory to matters foreign to the natural sciences. To Professor Langdell it seemed the most natural plan possible. He had devised part of it in his own student days. He understood himself to be simply applying to the student stage of the lawyer's life the method established from time immemorial as to the work of the practitioner and the judge. On the title-page of his first collection of cases, he tied himself to the past by quoting words written by Coke two centuries earlier: "It is ever good to rely upon the

book at large, for many times *compendia sunt dispendia*, and *melius est petere fontes quam sectari rivulos.*"

After Professor Langdell began the new plan, to persevere with it required further courage; for the majority of students, teachers, and practitioners showed only too clearly that they considered it foolish and almost sacrilegious to lay aside old methods and the time-honored treatises. Many years passed before the new system was adopted unanimously by Professor Langdell's colleagues. Meanwhile the Harvard Law School was bitterly attacked upon the supposition that this was the only method used; and in consequence, the attendance remained nearly stationary, being saved from serious diminution by nothing but the increase in the attendance upon Harvard College, and in the resort of Harvard graduates to the law school. About 1890 there came a great change. Almost simultaneously the Harvard Law School began to grow and the Langdell system began to spread to other universities. To-day Professor Langdell's triumph is complete. Time has demonstrated that persons trained under his system are sound and successful lawyers. That system is now the only one employed at Harvard. Most of the other law schools use it, wholly or partly, or some modification of it; and those which cling to old methods find it advisable to insert in their announcements argumentative matter to the effect that they combine with the old methods some features of the method discovered by Professor Langdell. The law schools employing the new system, wholly or partly, in its unmodified form, are distributed widely; and leaving out of the account states in which there are no law schools at all, one might have traced for Professor Langdell a triumphal progress from the Atlantic to the Pacific, passing exclusively through states in which at least one law school professedly uses his system.

To present, even inadequately, the chief facts as to Professor Langdell's greatest achievement has rendered it impracticable to enumerate his other services. Yet it must not be forgotten that for twenty-five years he was the Dean of the Harvard Law School, administering numerous duties with justice and with painstaking attention to detail; that he did much to promote the vast growth of the Harvard Law Library; that he produced four selections of cases, pioneer volumes made with great labor; and that he wrote three treatises, unsurpassed for accuracy, originality, and clearness. It should be added that his system of study has required teachers of law to do work of greater thoroughness and has thus aided to

create, as a sort of by-product, the dignified career, now pursued by ten times as many persons as in 1870, of the professional teacher of law.

This remarkable record has been recognized at Harvard in ways that are obviously not perfunctory. In 1895, when Professor Langdell resigned the deanship, there was a great assembly of Harvard Law School graduates in his honor. In 1900, when he resigned the Dane professorship, the Harvard corporation appointed him Dane Professor of Law, *Emeritus*. In 1903 the corporation named in his honor a Langdell professorship, — an unprecedented compliment for Harvard to pay to a man still living. In 1906 the corporation assigned to the additional building for the law school the name of Langdell Hall; and when this building is completed it will be the only university building bearing the name of a professor.

And the man himself? Guileless, and shrewd; grave, and cheerful; modest, and fearless; not given to speech; persistent in the search for truth — on the last day of his life, though oppressed by infirmities, doing a full day's work: in short, the man's whole nature harmonized with his rank as a great master.

To do justice to the rare genius just now gone, it is not necessary to speak slightly of others. Has some other American, in any branch of knowledge, overthrown an established system of study and replaced it, in his own university and elsewhere, with a new and useful system so thoroughly identified with him that men call it by his name? If so, let the name of the man who has performed that brave and laborious service be placed beside Professor Langdell's at the head of the list of American scholars.

Eugene Wambaugh.

PROFESSOR LANGDELL—HIS STUDENT
LIFE.¹

PROFESSOR LANGDELL was born at New Boston, N. H., May 22, 1826. His lineage was in part Scotch-Irish, and Scottish traits were prominent throughout his career. He attended for a short time an academy in Hancock, N. H.; worked in a factory at Manchester; and then entered the Phillips Exeter Academy in the spring of 1845 as a candidate for one of the scholarships to be awarded in July of that year. Slow of speech and with a hesitating manner, he was not at first appreciated at his real worth. In the recitation of Latin declensions and conjugations younger students, quick in movement and glib of tongue, impressed the authorities more favorably. When the award of scholarships was made at the close of the term, Langdell was not one of the successful candidates. This was undoubtedly the greatest disappointment of his life, and with many men would have ended all effort to obtain an education. He would have to wait a year before another award of scholarships. His earnings at the Manchester factory, if retained by him, would have carried him through the year, but he had already used part of those earnings in assisting his father. With much misgiving he concluded to remain in the Academy. The authorities gave him some work to do about the building; and by the end of the year the teachers and trustees had come to recognize his ability, and he was awarded a scholarship.

In 1848 Langdell entered the sophomore class at Harvard. Here there was no delay in recognizing his merits. At the end of the year he ranked second in the class. But in those days the college furnished very little in the way of scholarships or other aid, and long before the end of the junior year Langdell left college. The reason was understood to be want of pecuniary support. To-day no student of his promise would be permitted to leave any prominent college for such a reason. Later in life, when Professor Langdell and his colleagues in the law faculty

¹ This account of Professor Langdell's early years is part of a sketch of his life printed in the September number of the *Bulletin of Phillips Exeter Academy*. A few alterations have been made.

were awarding scholarships, he said with much feeling that he did not wish any deserving young man to be compelled to leave the school for lack of financial assistance.

Leaving Cambridge, he returned to Exeter, doing in that vicinity whatever would help support him. After some manual labor and a little teaching, he began the study of law in the office of Messrs. Stickney and Tuck. In November, 1851, he entered the Harvard Law School. The faculty soon found him out; and he was made librarian, an office held at that time by students. Professor Parsons, then preparing an edition of his work on contracts, had a keen scent for able young assistants, and employed Langdell as one of his helpers. Without disparaging the distinguished author, it may truly be said that the collection and analysis of authorities, which make the notes of Parsons on Contracts so important a feature of that work, are due largely to his young assistants, and to no one more than to Langdell. Langdell's reputation in the law school may be judged from the fact that in 1854, when his former classmates were receiving the degree of A.M. in regular course, the college conferred upon him the honorary degree of A.M. Later the degree of A.B. was conferred upon him as of the year 1851, and his name now appears with his old class in the quinquennial catalogue. The compliment of election as an honorary member of the *Phi Beta Kappa* society was received by him in 1853, while he was yet a student in the law school.

In 1854 Langdell left Cambridge to engage in the practice of law in New York.

Jeremiah Smith.

PROFESSOR LANGDELL—HIS PERSONAL INFLUENCE.

CHRISTOPHER COLUMBUS LANGDELL—How fond we were of you, our great teacher, our wise and patient friend! You directed our undirected steps. You took us to the original sources of the law and kept us there. You taught us that in law, no less than in any other science, there is no substitute for accurate, painstaking original research.

Your coming to Cambridge, early in 1870, was unheralded and at first almost unknown to the school at large. As we look back upon those days before your regular teaching had begun, when, by some happy chance, it was borne in upon a very few that a great teacher had come among us and we were led to seek you out, our hearts are glad and we are grateful.

We were drawn to you at first by no display of learning, — for you were ever incorrigibly modest, — but by your simple, unaffected friendliness when we sought your aid. You filled us with faith in yourself and with courage to tread the true path, no matter what the effort. So close was our friendship and so personal your leadership that we are inclined to wonder whether, after all, the question is not so much what we study as with whom we study. You taught us something more than to study law at the sources of the law. Like every great investigator who follows a path where "one walks abreast in a century," your daily work led us to "plant patience in the garden of the soul." It seems sometimes as if that were your greatest gift to those who in the early days worked with you, without much encouragement from any, and with much good-natured ridicule from many who could see nothing in your teaching beyond what they called the study of isolated cases.

Your whole nature led you to an unremitting quest after the governing principle in every new set of facts. You drew us with you in this daily search, and taught us not to rest content until we had found for ourselves the governing principles of the law. Who can estimate how much we owe, not merely to your instruction, which never suggested the pedagogue, but to that gentle influence which came to us as an emanation?

We were with you when you were laying the foundations of a great temple in which your memory is enshrined. If, as we believe, those foundations are to endure, it is not only because you who laid them were a great master and brought a great intellect to the teaching to which you devoted your life, but because over and above all you were one of the wise-hearted men of your time.

Austen G. Fox.

PROFESSOR LANGDELL—HIS LATER TEACHING DAYS.

TO the generation of students which knew Mr. Langdell only after the school was settled in Austin Hall his most characteristic quality was patience. Whether in working slowly and carefully to a conclusion or in defending that conclusion against all assaults, he never allowed himself the luxury of assuming a point, however axiomatic it may have seemed to him. If he had occasion to examine a decision, he would study it for hours or for days, lest some feature of it might be overlooked; if he used a case in class, he would state the facts with careful fullness, and he would draw from it not only the lesson that seemed of immediate interest, but every other lesson that could possibly be of value to a lawyer. His scholarship was exhaustive and sound rather than brilliant; his teaching was thorough and profound, but we did not get in his lecture-room that intellectual exhilaration which we never failed to feel when we sat under his greatest disciple. He himself was accustomed to speak of his mind as a slow mind; but now and then a flash showed that the slowness was the result of a determination to come to no conclusion without the fullest and most careful consideration.

When we entered his lecture-room, we were struck by the massive intelligence of his brow, we admired his serene and almost impassive face, and we seemed to find the quiet intellectual atmosphere of the cloister. In our time, as a result of his failing sight, he never used the Socratic method in his teaching. He simply talked, slowly and quietly, stating, explaining, enforcing, and reinforcing the principles which he found in the case under discussion. Our note-books read like his articles on Equity Jurisdiction; quiet, forceful, full of thought, and requiring close study to follow them. His manner was usually as quiet as his words. Only now and then, when some subtle point was raised by Judge Mack or Professor Williston (not then judge and professor), his face would light up, and he would begin to think aloud, to the vast delight of those members of his class who could follow him. Those were halcyon days. And once in a great while something would amuse him, and then he would throw back his great head

with a laugh that seemed to have the full strength of his mind in it. Probably no one who heard it will ever forget his amusement when, in the course of a most learned discussion about the nature of an account, some one mentioned the Massachusetts action upon an "account annexed."

It was largely owing to Mr. Langdell's manner in class, and to his careful fullness of statement and of discussion, that his law sometimes seemed too academic; and many of his students said, if they did not really feel, that his teaching was magnificent, but it was not law. He was quoted as speaking of "a comparatively recent case decided by Lord Hardwicke," and he was believed to regard modern decisions as beneath his notice. In the subjects of Equity and Suretyship, which he was then teaching, one might have fancied from his list of cases that Lord Eldon was still on the woolsack and that America was legally undiscovered. Even his warmest admirers felt constrained to give up his course on Mortgages when at Christmas-time he was still dealing with the rights of tenant and mortgagee under a common law mortgage, and had not yet informed us that equity preserved a right of redemption after breach. His list of cases on Specific Performance of Contracts held out the fond hope that we should get as near to the present as the case of *Lumley v. Wagner*; but there was only time in the last lecture for a hurried but scathing criticism of that decision. His manner of treating the subjects he taught was unimpassioned and coldly logical, and his intellectual deliberation seemed medieval.

The quietness of his teaching, however, was the quietness of intensive force, and the antique seeming of his law was all on the surface. We found that we were carrying away his ideas in our heads as well as in our note-books, and that those ideas really represented the law of the present time. We thought it wise to examine modern cases; we took the Massachusetts Digest and collected and carefully studied the current decisions on Equity Jurisdiction; and we found that the judges of the present day were saying precisely the same things that Mr. Langdell had been telling us, though possibly the words sounded more modern from their lips. One of his pupils of that day still prizes his notes of the lectures on Equity Jurisdiction, annotated by a full collection of the Massachusetts and modern English authorities, as one of his most useful law-books. Nearer acquaintance led us to appreciate at its true worth the painstaking and accurate learning of

Mr. Langdell's mind, as it led us to admiration and affection for the sterling honesty and the untiring generosity of his character. The test of time has certainly justified his teaching, not only in the learning, but also in the preparedness of his pupils for modern conditions and their mastery of modern law.

To his patient thoroughness we owe his articles on Equity Jurisdiction, which embody the results of long thought and investigation. I happened to be responsible for the now obsolete department of Lecture Notes in the first numbers of the HARVARD LAW REVIEW, and went to him to ask if we might print notes of his lectures on an abstruse point. After long thought he decided that it would be better if he went a little more thoroughly into the matter, and wrote an article upon it. As he wrote, he became engrossed in the line of thought involved, and he decided to expand his article into "A Brief Survey of Equity Jurisdiction," which might perhaps require three monthly articles. He actually worked on the articles seventeen years.

The same characteristic distinguished his work as Dean of the Law School. For twenty-five years the whole administration of the School was carried on with the most minute care. Whether a great measure of policy was under consideration, or the granting of a scholarship, procuring a new Professor or a new book for the library, every consideration which occurred to his great mind on either side of the question was faithfully and even anxiously weighed; the precedents, if any, were examined, and a general principle deduced to govern the case; and it may be truly said that his decisions were so carefully made that they were never overruled or reversed.

We sometimes in our haste think that minds that act with deliberation are apt to be too cautious to accomplish great things. Mr. Langdell acted deliberately, and his nature was thoroughly conservative; yet few men, however radical, have effected greater changes than he.

Joseph H. Beale, Jr.

PROFESSOR LANGDELL—HIS SERVICES TO LEGAL EDUCATION.

IF Professor Langdell had done nothing more than to write his "Summary of Equity Pleading" and his "Brief Survey of Equity Jurisdiction," his title to rank as one of the great masters of the law would be undisputed. If his legal work had been limited to leading the discussions with his pupils, his influence upon the law would have been far-reaching. It was a liberal education to his students to follow the working of his mind in the classroom, and many of his pupils, like the writer of these lines, recognize with gratitude that he did more for their intellectual development than any other man. But pre-eminent as he was as a writer and teacher, his chief distinction is his success in the reorganization and development of the Law School.

The Law School has had two flourishing periods, — the one covering the years 1829–1845, when Judge Story was a professor; the other extending from the advent of Professor Langdell, in 1870, to the present time. In the twelve years before Story came the School was feeble, languishing, and, at the end, almost moribund. During the twenty-five years after Story's death the School, although doing much good work, lost ground as to resources, number of students, and condition of the library.

The transformation of the School wrought by Langdell was a wonderful achievement, — an achievement, it should be said, that would have been impossible without the sympathetic and steadfast support of President Eliot. When Langdell came, there were but three professors giving ten lectures a week to 115 students, and the degree was conferred after one year of residence upon "persons admitted to the School without any evidence of *academic* acquirements and sent from it without any evidence of *legal* acquirements." He lived to see a faculty of ten professors, eight of them his former pupils, giving more than fifty lectures a week to over 750 students, and bestowing the degree upon college graduates only after three years of residence and the passing of three annual examinations. At the beginning of his services here, the Treasurer's books disclosed a deficit. At the time of his death the surplus was nearly half a million dollars, large enough to provide a

library fund of \$100,000, and an additional building with ampler accommodations than those of Austin Hall, to be named, with peculiar appropriateness, Langdell Hall. Since 1870 the library has increased more than tenfold, from 8700 to 96,000 volumes, and is believed to be without a rival, if regard be had to the number, editions, and physical condition of the books.

Professor Langdell had the satisfaction of seeing, as one result of his innovations, a thoroughgoing change in the quality of the law students. Thirty-six years ago they were looked down upon by the college undergraduates as inferior beings. To-day, by common consent, they are the élite of the university students.

But the most fruitful change of all was the revolution effected by Langdell in the mode of teaching and studying law, — a revolution now so complete that most persons hear with surprise that, when his "Cases on Contracts" was first used, his disciples were a mere handful and known as "Langdell's freshmen," a name given as a term of reproach but received as a title of honor; that the students for a dozen years were divided into the Langdellians and the anti-Langdellians, and that unanimity among his colleagues came only in the second half of his administration. In the last ten years his method has conquered its way into a majority of American law schools. To his pupils and colleagues it is a constant satisfaction that this man of genius was permitted to see his views dominating legal education throughout the United States.

James Barr Ames.

VOLUNTARY ASSUMPTION OF RISK.

I.

THE maxim *volenti non fit injuria* as expressing the principle that one who has voluntarily encountered a known danger cannot recover from the creator thereof, has of late years been much discussed in relation to a particular class of cases, those brought by workmen against their employers to recover for injuries received in the course of their employment. Neither the maxim nor this principle, which among other things it expresses, is confined to this particular class of cases, nor does it state any isolated or anomalous doctrine. It is not in any way founded upon anything peculiar to the relation of master and servant, nor is it based upon the contractual nature of the relation. It does not result from an implied term in a contract creating the relation; it applies equally to any relation voluntarily assumed — contractual or not. The maxim *volenti non fit injuria* is a terse expression of the individualistic tendency of the common law, which, proceeding from the people and asserting their liberties, naturally regards the freedom of individual action as the keystone of the whole structure. Each individual is left free to work out his own destinies; he must not be interfered with from without, but in the absence of such interference he is held competent to protect himself. While therefore protecting him from external violence, from imposition and from coercion, the common law does not assume to protect him from the effects of his own personality and from the consequences of his voluntary actions or of his careless misconduct.

The doctrine of the so-called voluntary assumption of known risks is but one of the expressions of this fundamental idea; other exhibitions of it, differing only with the conditions to which the conception is applied, are the defenses of consent and of contributory negligence. None of these is identical with any other, none is derived from the other, all are derivatives from a common source.

In the law of torts, at least, the idea of any obligation to protect others was abnormal. In time it came to be recognized that such duties might be forced upon persons who should engage in certain public pursuits. Upon carriers, innkeepers, and those engaged in

the many trades and callings which mediæval society regarded as services essential to the public well-being, was laid, as an inseparable incident, the duty not merely of refraining from injurious misconduct, from violence and fraud, but in addition the duty of the positive performance of careful service. In time many obligations of a somewhat similar sort were imposed upon certain classes of often occurring relation, thus eating into the original conception that a man had no cause of complaint if violence were not done to him and if he were not misled to his harm. But even to these new relation obligations the individualistic tendency of the law lent its color. When the obligations inherent in the various relations in which in civilized society the citizens are placed to one another came to be formulated, it was almost universally held that fair play was all that was required from one who was dealing without recompense with another. A gratuitous bailee owed to his bailor merely the duty of good faith to treat his bailor's goods as his own.¹

When one lent to another a chattel, there was no duty save that of full disclosure of those defects which were not obvious to the borrower, but were known to the lender.² Beyond that the borrower, if he chose to use another man's property, must protect himself. If inspection were required to insure the safe use of the thing borrowed, he, and not the lender, must make it. So too, where an owner of land permitted others to come upon it, or even where he invited them to come,³ but for a purpose not connected with his business use of his premises, he was held bound to disclose any known defects not obvious to his guest, but to do no more. And when he held open his land as a place to which his business patrons or clients might come for his, the owner's, purposes,⁴ even then, while he was held bound to know of defects which a reasonable inspection would discover, having discovered them, he fulfilled his obligation, if, not choosing to repair the defect, he gave to his customers or clients notice of its existence.⁵

Throughout it is seen that the obligation to do more than afford

¹ While this was later modified to require the bailee to take such care as a man should of his own, it still continued to express the idea of fair play, an average fair play, — the good faith of the good citizen.

² *McCarthy v. Young*, 6 H. & N. 329.

³ *Southcote v. Stanly*, 1 H. & N. 247.

⁴ *Indermaur v. Dames*, L. R. 1 C. P. 274, per Willes, J.

⁵ See *Kelley, C. B.*, in *Indermaur v. Dames*, L. R. 2 C. P. 311.

others the opportunity to protect themselves is anomalous and exceptional.

Where, therefore, one voluntarily acts or enters into a relation contractual or otherwise with another, his knowledge of the risks inherent to his action or to the relation created, disproves the existence of any duty on the part of the creator of the danger to remove it, just as consent to suffer violence destroys the wrongfulness of its application. Neither knowledge of a danger voluntarily encountered nor consent is a defense which, while admitting the breach of a duty, justifies or excuses it, or which debars the plaintiff from recovering because himself a wrongdoer. Such is the view of Lord Justice Bowen in *Thomas v. Quartermaine*.¹

Another view is often expressed, that it is a defense admitting the defendant's duty and its breach, but alleging that the plaintiff, having voluntarily encountered the danger, has impliedly consented or agreed to assume the risk.² This attitude is most often assumed

¹ 18 Q. B. D. 685. Knowlton, J., in *Fitzgerald v. Conn. R. Paper Co.*, 155 Mass. 155, while expressing concurrence with this view, shows a confused leaning to other conceptions. At p. 159 he says: "The plaintiff's conduct in voluntarily exposing himself is an act which as between the parties makes the defendant's act no longer the proximate cause of the injury." Now legal proximity may be important in two ways: it may determine the defendant's duty to refrain from some particular act, or the extent of his liability for the consequences of an admitted wrong. See 40 Am. L. Reg., N. S., 79 and 148. If the defendant could not foresee that the plaintiff would probably expose himself to the danger, the defendant as to him is guilty of no wrong in creating it; if, though his act was wrongful, the plaintiff's exposure was not the natural consequence of it, the defendant is not liable for the ensuing injury. Now, while no one is legally bound to anticipate that others will officiously intermeddle or act wrongfully or recklessly, and so is not responsible for what they may do with opportunities or under temptations of the defendant's creation, where such other has the right or is bound by a legal or social duty to act as he does, or if he acts under the defendant's orders and for his benefit and just as he intended (the actor's sole freedom of volition being a legal right to refuse obedience and leave an employment in the course of which he is bound to obey), such action is more than natural and probable, it is actually induced and intended. Again, to say that an act is the proximate cause of an injury only as between the parties is to add a new element of confusion to a subject already difficult. If the act and the consequences are the same, the legal proximity of the one to the other, depending as it does on the foresight of the normal man or on the course of nature, cannot be affected by the personality of the plaintiff, who, it is true, may for other reasons be barred by it. It is a confusing misuse of the word to say that if a servant voluntarily driving a known skittish horse is injured together with a stranger in the ensuing runaway, the master's act in supplying the horse is a proximate cause of the stranger's injuries but not of the servant's. The same confusion of thought beclouds the subject of contributory negligence. See Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685. See an admirable treatise on Contributory Negligence by Charles H. Burr, Esq., of the Philadelphia Bar.

² This is probably in reality the attitude of Lord Esher in *Yarmouth v. France*,

where the relation is one created by contract and the assumption of risk is considered as an implied term of the contract creating the relation. Where there is a statute creating a duty or relation so far of right that an obligation is imposed upon the defendant that the plaintiff may safely enter or remain in it, this is no doubt the aspect in which the maxim presents itself for application. In such case mere knowledge is not enough; a true unconstrained consent, with full knowledge not merely of the danger but of the right to protection as well, is required to waive liability for the breach of an existing duty.

The defense of contributory negligence is quite distinct.¹ Negligence involves the idea of misconduct, a failure to measure up to the standard of that ideal personage the normal social man; assumption of risk does not. A risk while obvious may not be so imminently dangerous that a prudent man would necessarily avoid it, yet if it shall be freely encountered it will in general be held to be so far assumed that no recovery for consequent injury is possible. Voluntary conscious action may be negligent² if the known

19 Q. B. D. 647, and would naturally follow from his position that, under the Employers' Liability Act of 1880, a duty was created to see that the plant was in safe condition. His language is: "I think there is a duty; though I agree that there is no actionable breach of that duty if the person injured, knowing and appreciating the danger, voluntarily encounters it." Now this indicates a duty owed to plaintiff the breach of which is excused by his consent thereto,—not the idea of a duty in the air, a duty to others who may be ignorant, but not to the plaintiff who knows. Such a conception as the latter is utterly foreign to the remedial view point of the common law which disregards as quite immaterial any duty not owed to the plaintiff. Knowlton, J., in *Fitzgerald v. Conn. R. Paper Co.*, 155 Mass. 155, ascribes to Lord Esher the view that there is a duty of imperfect obligation, performance of which the law will not enforce. It is fair to presume that Lord Esher did not intend to announce a doctrine so foreign to the whole spirit of the common law.

¹ Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. D. 485. This is particularly noticeable in those jurisdictions where special verdicts are rendered. A finding that the plaintiff has not been guilty of contributory negligence does not in any way preclude inquiry as to whether he, knowing the risk, has voluntarily encountered it and so cannot recover, though the two are often confused. This has been especially so until late years. In Pennsylvania this confusion is particularly marked; in all the cases, save perhaps the latest, the voluntary encountering of a known risk is spoken of as contributory negligence (see *Patterson v. R. R.*, 76 Pa. St. 385), thus unnecessarily branding as culpable the innocent victim who sacrifices himself to the necessities of his family.

² In fact the two cases, *Cruden v. Fentham*, 2 Esp. 685 (1798) and *Clay v. Wood*, 5 Esp. 44 (1803), which preceded *Butterfield v. Forrester*, 11 East 60 (1809), were clearly cases where the plaintiffs voluntarily put themselves in positions of known danger to insist upon their right of way under the rules of the road. In fact, Lord Ellenborough in *Butterfield v. Forrester* says, "a party is not to cast himself upon an obstruction made by the fault of another and avail himself of it, if he do not himself use ordinary

danger be great and imminent, but it is not negligent because voluntary. By contributory negligence a plaintiff is barred from recovery by his own misconduct, though the defendant has been guilty of an act admittedly wrongful as to him. Voluntary subjection to a known risk negatives the existence of any duty on the defendant's part by the breach of which he could be a wrongdoer.

It is essential that the two ideas should be kept quite distinct. For just as there may be voluntary subjection without negligence, there may be negligence though the subjection is not voluntary. In such case the danger may be so great and imminent that no prudent man may face it, even to assert his legal rights or perform his legal or social duties, — no man of course being allowed to insist on his extreme rights in the face of certain injury. Or the plaintiff who may be entitled to run a known and appreciated risk may have failed to take those additional precautions which the known risks of his situation require. In either case, though for any reason the doctrine of voluntary (so-called) assumption of risk may not apply, the plaintiff will undoubtedly be barred by his contributory negligence.

There are, however, certain broad classes of cases in which the voluntary encountering of a perfectly well-known and appreciated danger has been held not to involve an assumption of the risk of the resultant injury. Two are stated by Bowen, L. J., as follows:¹ "The injured person may have a statutory right to protection, or again, the plaintiff may have a common right or individual right at law to find these particular premises (or appliances) free from danger, as in the case of lands on which a market or fair has been held."

caution to be in the right." The defense of contributory negligence as developed in the line of decision following that case is perhaps the highest expression of the individualism of the law. It requires every one not merely to assume the risks which to his knowledge attend his voluntary acts, but also to bear all those injuries which he may receive through his own misconduct, whether mere unthinking careless acts and omissions or conscious reckless exposure to unwarranted risk. He cannot throw the burden of his own personal neglect or rashness on the shoulders of another whose wrong has contributed to cause the injury. It seems quite unnecessary to resort to any other basis for this defense than the general individualistic tendency of the law. It is quite clear that it cannot rest on the application of the general doctrine of proximate cause, and to say that the plaintiff is bound as a joint wrongdoer is open to the objection taken by William Schofield, Esq., in 3 HARV. L. REV. 266, that the duty of self-preservation is at best a moral and not a legal obligation, and that therefore the plaintiff is not legally a wrongdoer. See *Saylor v. Parsons*, 98 N. W. Rep. 500.

¹ In *Thomas v. Quartermaine*, 18 Q. B. D. 485.

In addition to the illustration given by Bowen, L. J., of a market or fair,¹ other common instances of persons having a common or individual right to find the premises free from danger may be grouped into the following classes:

1st. Where a traveler uses a highway known to be somewhat dangerous, there being no other convenient safer way whereby he may reach his destination.²

2d. Where a tenant of offices or a flat, the approaches, stairs, halls, elevators, etc., of which remain under the control of the landlord, together with the duty of safe maintenance, knowing that this duty has not been performed and that the approaches have been allowed to become unsafe, remains in possession and does not immediately throw up his lease.³

This principle is equally so where one not the tenant but entitled in his right to use the premises continues to do so with like knowledge.⁴

3d. Where a shipper of goods or an intending passenger to whom the carrier is bound to furnish carriage and access and egress to and from the premises for the purpose, knowing of some slight imperfection in the appliances of carriage or in the approaches to the stations, persists in having his goods carried or who uses such defective means of access or egress.⁵

¹ *Lax v. Mayor of Darlington*, 5 Ex. D. 28.

² *Mellor v. Bridgeport*, 191 Pa. St. 564; *Pomeroy v. Westfield*, 154 Mass. 462; *Norwood v. Smeuville*, 159 Mass. 105; *Harris v. Clinton*, 64 Mich. 447; *Musselman v. Borough*, 202 Pa. St. 490.

³ *Looney v. McClain*, 129 Mass. 529; *Dollard v. Roberts*, 130 N. Y. 269. See remarks of Mathew, L. J., discussing *Cavilier v. Pope*, [1905] 2 K. B. 757, p. 767. The case was decided against the wife of a tenant on the ground that the landlord not having control owed no duty to repair save by a contract to which she was not party. *Ide v. Mitchell*, 5 N. Y. App. Div. 208; *Watkins v. Goodall*, 138 Mass. 533; *Guda v. Glucose Co.*, 154 N. Y. 474. In *Payne v. Irwin*, 144 Ill. 482, the tenant apparently had actual physical control, and in fact it was questionable whether the defect was not due to his own act.

⁴ *Looney v. McClain*, 129 Mass. 529; *Marwedel v. Cook*, 154 Mass. 235.

⁵ *Osborne v. R. R.*, 21 Q. B. D. 220, especially the opinion of Grantham, J. See however *contra*, *Goldstein v. R. R.*, 46 Wis. 404, a case which perhaps may be explained, as may be *Miner v. R. R.*, 153 Mass. 398, on the ground that the plaintiff had other though less convenient access, or that by waiting the obstruction not in its nature permanent might have been removed. See also *contra*, dictum of Parke, B., in *Priestly v. Fowler*, 3 M. & W. 1. Where a passenger's carriage comes to a stop beyond the platform of the station which is his destination, he may alight at such point even if the attempt is attended with some risk if he "is satisfied that the train is going on and there is no other alternative but to get out." *Cockburn, C. J.* He need not sit still and be carried to the next station. *Rose v. R. R.*, 2 Ex. D. 248; *Robson v. R. R.*,

4th. Where a landowner's access to his premises having been impeded or rendered dangerous by the defendant's wrongful act, he braves the danger to raise the siege.¹

5th. Where by the defendant's wrongful misconduct the plaintiff is endangered in the performance of work not upon the defendant's premises and at a point where the plaintiff has a right to be irrespective of the defendant's consent.²

6th. Where one moves to a nuisance, or knowing of a wrongful act by an adjacent owner continues to use his land for the purpose for which it is naturally adapted, but which through the defendant's misconduct involves a risk of injury to his person or property.³

To these may be added the class of cases where the plaintiff has under an exigency caused by the defendant's wrongful misconduct acted consciously and voluntarily in a way which has subjected him to known danger, but where he has so acted in the protection of some legal right or in the performance of some legal or social duty, as where the plaintiff has risked his life to save that of another imperilled by the defendant's wrongdoing, in the performance of his duty,⁴ or in obedience to the dictates of his manhood,⁵ whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no duty save that of humanity.⁶ Similarly, the

L. R. 10 Q. B. 271, 2 Q. B. D. 85, though *Bramwell, B.*, in *Siner v. R. R.*, L. R. 3 Exch. 150, thought he should go on to the next station and then sue the company. In *Siner's* case there was another alternative — she might have called upon the guard to back the train.

¹ *Clayards v. Dethick*, 12 Q. B. D. 439, where a livery stable man was held entitled to lead his horse over a trench wrongfully dug in front of his stable. *Hickey v. Waltham*, 159 Mass. 460. *Holmes, J.*, decided on facts practically the same as in *Clayards v. Dethick*, that it was for the jury to say whether the plaintiff's conduct was a bar to her recovery (as being a voluntary assumption of the risk of a known danger) and said: "One fact to be considered was the strait that she had been placed in by defendant," "practically besieged and walled in," and also that another question for their consideration was whether she had fully appreciated the risks of the condition of the ditch and pile of dirt, which had been changed since she had last observed them.

² *Thornsville v. Handyside*, 20 Q. B. D. 359.

³ *Kellogg v. R. R.*, 26 Wis. 223; *Donovan v. R. R.*, 98 Miss. 147. See however *Anthony v. Krum*, 115 Pa. St. 431.

⁴ 88 N. Y. App. Div. 389, a policeman stopping a runaway, or an engineer staying upon his engine in the hope of averting a collision, as in *Cottrill v. R. R.*, 47 Wis. 634.

⁵ *Eckert v. R. R.*, 43 N. Y. 502.

⁶ As in *Corbin v. City*, 195 Pa. St. 461, the decision in *Eckert v. R. R.*, while often

principle that one who to save his own property runs a risk which a prudent man would under the circumstances encounter is not to be taken to have assumed the risk thereof,¹ was extended, in *Lining v. R. R.*,² to cover a case where the plaintiff voluntarily exposed himself to a risk in trying to remove the horse of a friend with whom he boarded, from a stable threatened by a prairie fire which had been started by the defendant's negligence.

In all such cases the plaintiff's person or property or the person or property of another must be threatened with injury as the result of some wrongful misconduct by the defendant.³

It would seem that in reality these cases do not form a definite distinct class from the second class of cases mentioned by Bowen, L. J.; in fact they are all referable to the same general principle, that one who has the legal right or legal or social duty to act as he has done under the conditions created by the defendant's wrong does not act voluntarily, his action is caused by the coercion of the circumstances which the defendant's wrong has created. In all the plaintiff had a right to do what he did or be where he was injured which was in no way dependent upon the mere consent of the defendant, a consent which he was free to give or withhold.

In all there has been a wrong done by the defendant. An admitted duty has been violated; either a statutory requirement has been neglected, a legal right impeded and hampered, or some wrong done threatening the plaintiff's person or property, or the person or property of some other to whom he owes some duty, either legal or social. In none is it necessary to rely upon a duty to protect others from the consequences of their own conscious,

criticised, has been generally followed, and no contrary case has ever been decided. In England, where the precise question has never arisen, it has been spoken of with approval by Mr. Beven and by Sir Frederick Pollock.

¹ *Rexler v. Starin*, 73 N. Y. 600. The owner of a boat went on it to prevent an imminent collision with the defendant's vessel. While the case is treated as one of contributory negligence, it was held that "he had the right to do so, almost a duty." See also *Wasmer v. R. R.*, 80 N. Y. 212, where plaintiff ran in front of a moving train in an attempt to save his horse frightened by defendant's negligence.

² 91 Ia. 245. See however *contra*, *Cook v. Johnson*, 58 Mich. 437, where a wife who entered a stable in full blaze to save her husband's horse was held to have acted voluntarily and to have taken the risk upon herself.

³ *Hiatt v. R. R.*, 17 Ind. 102. See an extraordinary case in which it was held that one taking a risk to save the life of the defendant who had by his own misconduct imperilled himself could not recover for the reason that the defendant was guilty of no actionable negligence as towards himself; no man owing to himself any legal duty of care. *Saylor v. Parsons*, 98 N. W. Rep. 500 (Iowa).

intended acts. In such cases, therefore, something more is required than the plaintiff's mere knowledge of danger; he must encounter it under such circumstances as show either that he was negligent in so doing, because the danger was so great and imminent that no prudent man would face it even to protect himself or others, or to assert his rights either at common law or of statutory protection; or else he must have encountered it under such circumstances as to indicate that he voluntarily, willingly, and affirmatively assumed the risk, that he recognized the danger, knew his right to be protected from it, but still chose to encounter it, not because of the pressure or coercion put upon him by the defendant's wrongdoing, but for some private reason of his own.

Once find the existence of a duty¹ to avoid the creation of a danger and the question of the coercion of the plaintiff's will forcing him to encounter it becomes all important. The very term "voluntary assumption of risk" involves freedom of volition. The very individualism of the common law, which requires that each man shall bear the consequences of his own voluntary conduct, of necessity requires that it shall not impose an intolerable subjection to fortuitous advantages of superior physical, social, and economic position; that such advantages shall not be abused to obtain the mere form of consent while the substance of real volition is absent. There can be no real volition where there is no choice between at least two alternatives, neither of which involves the abandonment of a legal right or the relinquishment of the performance of a duty. While the common law makes no pretence of being a social reformer, and does not profess to reduce all persons to an absolutely equal position by eliminating all natural advantages, but rather, recognizing society as it is, considers social inequalities as the natural inevitable tactical advantages of those lucky enough to possess them, it does prohibit their misuse, while permitting their use within fair limits.

However, from time to time, certain classes of persons were recognized, either by the common law or by Acts of Parliament,²

¹ As Cockburn, C. J., says in *Clark v. Holmes*, 7 H. & N. 907, "It is unimportant whether a duty exists by virtue of a statute or at common law." If the duty exists, it can only be waived by an unconstrained voluntary consent (express or necessarily implied from the circumstances) to take all the risks. The difficulty is in the absence of a statute in discovering any duty at common law, save that of fair disclosure of latent dangers. See *Bramwell, B., Britton v. R. R.*, L. R. 7 Exch. 130, 138.

² Sometimes by the judicial interpretation of such acts.

as persons whose position rendered it impossible for them to contract upon anything approaching a fair footing of equality. Now, this might be either because of their lack of ability to appreciate the dangers inherent in the relation created or the consequences of their voluntary actions or contracts, as in the case of infants or persons of imperfect understanding, or because of their economic necessities which compelled them, whether or no, to face perils or assume burdens which they fully appreciated; so courts of equity have relieved expectant heirs from unconscionable bargains and so the courts of the United States have done what the Railway and Canal Act of 1834 has, as judicially interpreted, done in England, and have relieved shippers and passengers from an expressed consent to waive the carrier's liability for his or his servant's negligences, imposed as a condition to affording carriage to them. Now, while the reason often given in the American cases¹ is that it is against public policy to allow validity to such consent because it removes the incentive of care necessary for the protection of the lives and property carried, it will be noticed that this public policy does not extend to other voluntary relations where care is required to protect the life and property of one of the parties. As much danger and more is threatened the employee as the passenger; and yet from the mere fact of entering the service the former is held to assume all the risk while the latter is not bound by his consent even when expressly given. Care for human life alone will therefore not account for the peculiar protection afforded passengers and shippers. From what then does it proceed? Evidently from the fact that as a class they are at the mercy of their carrier. Carriage of one's person and goods is, under modern conditions, a necessity. The carriers are usually railroads having a practical monopoly, and so able to dictate as a condition of carriage such terms as they please unless the courts interfere to restrain them from abusing their power. Then, too, the common carrier owes the duty of carriage. The relation is not, therefore, one in any true sense voluntary, the pure creature of the will of the parties; one has a right to enter into it, the other is bound to do so. So in construing the Act of 1834, the House of Lords held that the courts had the power to pronounce upon the reasonableness of all stipulation as to the terms of carriage:²

¹ *Quinby v. Ry.*, 150 Mass. 365.

² *Williams, J.*, in *Peck v. R. R.*, 18 C. B. 805, affirmed in the House of Lords, 10 H. L. Cas. 473.

"Whereas the monopoly created by railways compels the public to employ them in the conveyance of their goods, the legislature have thought fit to impose the further security that the courts shall see that the conditions be just and reasonable"; and as Crompton, J., said,¹ "The real question [in determining whether the conditions are reasonable] is whether the individual and the public are sufficiently protected from being unjustly dealt with by persons having the monopoly." "The mischief [which the act was intended to prevent] was in compelling people to enter into contracts [of exemption as condition of carriage] whether they willed it or not." Where the carriage is not as common carrier, but purely gratuitous, or the result of some private arrangement for peculiar privileges, there seems therefore no good reason why the carrier may not make what stipulations he please as to the condition on which he shall carry the passenger or goods.²

¹ In *Beal v. R. R.*, 3 H. & C. 587, quoted with approval by Blackburn, J., in *Brown v. R. R.*, 8 App. Cas. 711.

² In *Lockwood v. R. R.*, 17 Wall. (U. S.) 57, the Supreme Court of the United States base their decision that a railway cannot free itself either by general notice or special contract from liability to its passengers or shippers for injuries caused by its negligence, upon the unequal footing upon which customer and carrier stand. In *B. & O. R. R. v. Voigt*, 176 U. S. 498, it was held that the railway was not acting as a common carrier in transporting the cars of an express company under a special contract, and that a clause therein exempting the railway from liability was valid. The plaintiff, an express messenger, who had in his contract with his employer expressly exempted all carrying railways from liability, had no right to demand such transportation, the railway no duty to grant it; it was a matter of purely private arrangement, and the railway could annex what conditions it pleased to the special service afforded. So in *Northern Pacific R. R. v. Adams*, 192 U. S. 440, it was held that in affording free transportation the railway was not performing a duty as common carrier, but granting a privilege; the passenger was not exercising a right, but enjoying a gratuitous benefit. "He was not in the power of the company and obliged to accept its terms. They stood on a perfectly even footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted the privilege he cannot repudiate the conditions." *Brewer, J.* The English law is the same. *McCawley v. Furness*, L. R. 8 Q. B. 57; and the preponderance of decisions of the American state courts follows the federal cases, though there are conflicting decisions in some jurisdictions. See cases cited in *R. R. v. Voigt*, and *R. R. v. Adams*, *supra*. Where free passage is given as an incident to the paid transportation of freight, American courts have as a rule held that the carriage is not gratuitous and that a clause of exemption from liability is void. *Lockwood v. R. R.*, *supra*; *Henderson v. R. R.*, 51 Pa. St. 315; see, however, *McCawley v. Furness*, *supra*, *contra*. In *Blank v. R. R.*, 182 Ill. 332, it was held that since a railroad was not acting as common carrier in transporting a Pullman car, a contract by a porter of the latter exempting the carrying road was therefore not against public policy. He was being carried by virtue of a merely private arrangement, as to which both parties had full latitude of contract.

These principles have been applied to the relation of master and servant. Under the first it is universally held that if the servant is of tender age, imperfect intelligence, or lack of experience, the master is bound to point out the dangers and risk which are known or should be known to him to be incident to the employment, and such servant is not put on notice of them because they would be obvious to an intelligent experienced adult. Under the second, it has been held that a seaman who continues to work with an appliance known by him to be dangerous does not assume the risk, because he cannot leave the ship and his officers have the power to force him to continue work with the appliances as they are,—he is thus coerced by their power over him, and his act is in no true sense voluntary.¹

There is too, as naturally follows, a broad distinction between consent obtained by coercion applied by the person obtaining it and the coercion of extrinsic conditions in no wise caused by him who avails himself of it.² While no man could by imprisoning another obtain from him a binding contract in consideration of his release, there seems to be no doubt that a promise of reward to one who rescues another from such duress would be valid and binding. So the pressure of commercial or economic necessities in no wise caused by the wrongful act of him who seeks to profit by them, while it may make his action harsh and morally reprehensible, will not render his act in so utilizing his neighbor's distress for his own advantage legally wrongful.

There may be of course physical pressure so strong that the act ceases to be that of the person whose act it purports to be; such an act then becomes a mere nullity. It cannot bind the actor,

¹ The cases of *Eldredge v. Atlas Co.*, 134 N. Y. 187, and *Thompson v. Herman*, 47 Wis. 602, were cases where the defect was not obvious when the sailor signed on. If they had been, it would seem that its risk was assumed, or, to put it more accurately, the master in the absence of some special agreement owed the sailor no duty to repair conditions obvious when the sailor engaged to serve. There is no more compulsion on a sailor to sign than that upon a mechanic to take a job.

² In *Harris v. Clinton*, 64 Mich. 447, it was held that a plaintiff who attempted to cross a flooded unfenced causeway, it being his only way home, did not as against the township assume the risk; but the illness of the plaintiff's wife and his anxiety about her "could not be considered an element of proof to excuse him from incurring risks which he ought not otherwise to have taken." See an elaborate opinion by Holmes, J., in *Fairbanks v. Snow*, 145 Mass. 153, on the distinction between duress by parties to the action and strangers such as purchasers for value of negotiable paper. See also *Alaska Co. v. Domenico*, 117 Fed. Rep. 99, where the plaintiffs availed themselves of the defendants' economic necessities to force the rescission of a prior contract.

whether to him applying the coercion or to any one else. But this differs largely from the form of coercion discussed above. There is here a complete lack of all volition, not a mere coercion of the will. It is here that Lord Bramwell's conception of voluntary action is at fault. To him all acts are entirely voluntary where the actor is not physically constrained,—where his mind can command his body, where his muscles are free to answer to the dictates of his brain. In a long line of cases¹ he states this conception in his own singularly striking and forcible manner. To him there is no coercion save that which was recognized in that early era of the law when the only effective pressure was the constraint of physical force, of the power of feudal barons and their lesser imitators, who wrung from those who fell into their power grants by physical violence or imprisonment. He appears strangely unable to appreciate the true spirit of English freedom,—the peculiar tenacity of their privileges, that insistence upon the exercise of their legal rights even in the face of danger which has been the most marked influence in making them the free nation they are. Nothing could be more un-English than the conception that a right must be relinquished if it cannot be exercised with perfect safety,—that one who finds himself confronted with some slight risk² must relinquish his right and seek the aid of the courts to give him damages for its deprivation.

So it may be said that while from the beginning the law of torts prohibited external violence between strangers, and fraud and imposition between those dealing with one another, it left to all those who voluntarily entered into relations with one another the regulation of the amount of protection which should be accorded them, and in the absence of some bargain no duty of affirmative protective action was required. Soon, however, as has been seen, to certain trades and callings were annexed certain affirmative obligations of careful performance. In fact, very early it was recognized that to all gainful trades was attached a duty of competent workmanship therein,³ and with the growth of new activities

¹ *Siner v. R. R.*, L. R. 3 Exch. 150; *Lax v. Darlington*, 5 Ex. D. 28; *Membrery v. R. R.*, 14 App. Cas. 179, and *Smith v. Baker*, 91 App. Cas. 325.

² If the risk be so great and imminent and out of proportion to the right asserted, so that a prudent man would not encounter it, even to vindicate his right to attempt to assert it would be contributory negligence; in fact, the earliest cases in which the doctrine of contributory negligence was foreshadowed were cases of this kind. No man, even an Englishman, may insist even on his rights in the face of certain injury.

³ See 53 Am. L. Reg. 218-221.

the various relations resulting crystallized into definite classes with definite duties of varying sorts adhering to them. But the early conception that no affirmative duty was to be imposed save on a consideration moving to him on whom it was laid, though not necessarily from the beneficiary, remained in all its original vitality. And so in the absence of some particular benefit no duty was held to exist beyond that of personal good conduct,—no duty was recognized to answer that care be taken to secure the safety of others. Where then one entered into a voluntary relation with another, not for the particular benefit of such other and for a consideration paid to such other by some one, not necessarily the obligee, but either for his own benefit or the joint benefit of himself and such other, no duty was normally owed save that of full disclosure of the conditions under which the relation was to be constituted; at the most, and this only where there was joint benefit, there might be a duty to ascertain the true nature of the conditions imposed on him who, having the control of the premises or chattels to be used, had the ability to do so.

In a word, the only duty was not to seduce another into forming such a voluntary relation in reliance upon an appearance of safety known or which ought to be known to be deceptive. Beyond this, if any protection was desired the party must look to his ability to bargain for it. If he had more need of such relation than the other, he might be unable to obtain such protection by bargain. This, however, was his misfortune, not the other's fault. If the relation was purely voluntary, if it was one which neither party was legally bound to enter into; they might set what terms and conditions they pleased upon its creation. That the social or economic status of the parties gave one the power to make a harsh bargain did not concern the courts.

Coming now to the particular relation of master and servant, to which the maxim *volenti non fit injuria* is so constantly applied, a careful reading of *Priestly v. Fowler*¹ will show that Lord Abinger was not laying down any peculiar or anomalous doctrine applicable only to the particular relation,² but was applying to it

¹ 3 M. & W. 1 (1837). The first case in which the question of a master's duties to his servant was presented to an English court for decision.

² In *Southcote v. Stanley*, 1 H. & N. 247 (1856), Pollock, C. B., treats the case as authority for the proposition that a host owes no duty to a guest beyond that of disclosing latent dangers known to him, and says, "the rule applies to all members of a domestic establishment—a visitor at a house . . . must take his chance with the rest."

the general conceptions of the common law. The case came up upon motion to arrest judgment on a verdict in favor of the plaintiff on the ground that the declaration was insufficient. The declaration alleged in substance a duty on the part of the master to answer for it that a safe van should be provided for the use of his servant, who was injured through its breaking down. The duty alleged was one akin to that of a common carrier or of a person who for a direct compensation provides a structure for the use of the public. Although the case is constantly cited as the earliest case laying down the doctrine that a master is not responsible to one servant for the negligence of another, in fact the overloading of the van was only one of the breaches of this duty alleged. It was also alleged that the van was out of repair, and there was a general allegation of a breach of duty to provide a safe van. The negligence of the fellow servant in overloading, if such negligence existed (as the evidence at the trial indicated), was antecedent to the plaintiff's connection with the van. It had resulted in the creation of a defect which, as Lord Abinger says, was "not alleged to have been known to the master and unknown to the servant." The whole of the opinion is directed to proving that in the absence of some contract between the master and the servant there cannot be implied from the relation any duty to insure the servant's safety so far as care on the part of those whose duty it is to provide and maintain and load a van will insure it.

It will be noticed that he speaks of the negligence of a fellow servant, a coachman or cook or chambermaid, as the same in legal effect as that of a carriage builder and butcher or an upholsterer, all plainly independent contractors. It is evident that what he is speaking of is a duty to insure the sufficiency of the van so far as care could make it safe, a duty which nothing short of performance could satisfy, the neglect of which would equally make him liable whether occurring through the fault of a servant or of an independent contractor. His opinion in reality amounts then to this: a liability for anything but personal wrongdoing on the master's part based upon his knowledge and the servant's ignorance of the defect or of some personal active misconduct on the master's part must be based upon contract. Here the servant is on the premises and has the means of knowledge. He indicates¹

¹ In the course of the argument he says, "a passenger upon a coach pays his money in consideration of being carried, and there is an implied contract that he shall

that such a duty may arise out of actual consideration paid and exclusive control of the appliances of carriage, but he says: "The mere relation of master and servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is no doubt bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief. A servant is not bound to risk his safety in the service of his master, and may decline any service in which he reasonably expects injury to himself, and in most cases, if not all, he is just as likely to be acquainted with the probability and the extent of the liability as the master." The case is thus based entirely upon the inherent common law conception that no man is bound to take greater care of another than that other is of himself.

The master's duty is, in his opinion, evidently a personal¹ one to take care of the servant on those matters in which the servant is unable to protect himself. The duty ends where the servant's power of self-protection begins. Emphasis is laid upon the fact that there is no allegation that the servant did not know and that the master did know of the defect. If this had been so, there is no doubt that the master would have been held guilty of a breach of this personal duty. The servant, through his ignorance, could not protect himself either by extra precaution or in the last resort by refusing the duty. The master could protect him by either remedying the defect or giving him notice of its existence. In short, the case merely holds that a master as such owes no duty to his servant save that of a full disclosure of such defects as he knows of, so that the servant may protect himself, or if he please abandon the service,² to take care to make the business appear

be carried safely, and he has no means of knowing how the coach is constructed or loaded."

¹ It is also evident that Lord Abinger thought that the master owed no duty save his taking such care as he personally could to keep the business free from latent defects. The idea that a master owed to his servant a positive duty to inspect the premises and appliances, the performance of which could not be delegated to a subordinate so as to escape liability, was a later growth; in fact, it appears to have been first distinctly recognized in America. In *Vose v. R. R.*, 2 H. & N. 728, Pollock, C. B., says: "The statement in *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748, by Lord Cranworth, that it is the master's duty to be careful that the servant is not induced to work under the notion that tackle and machinery are staunch and secure, and when in fact the master knows or ought to know that it is not so, is merely a *dictum* of the Lord Chancellor in a Scotch case, not a decision of the House of Lords."

² It is noticeable that this defect was one which was superadded after the servant

as it is, and so no liability to a servant who knows of the defect through which he is injured.¹ There is throughout no indication of the idea that the servant has agreed to exempt the master from liability for injury from known dangers in consideration of the compensation bargained for in the contract of service.

Nor is such a contractual basis for the master's exemption necessary; the principle, common to all purely voluntary relations, that no duty is owing save that of fair disclosure of the actual conditions under which the relation is to be created or continued is entirely adequate to relieve the master from any obligation to his servant in regard to the known or open condition of his plant or premises, whether the defect was due to the prior negligence or willful wrong of the master himself or of a fellow servant. But even a bare licensee, that least favored of voluntary relations, while of course assuming, in the absence of some conscious concealment, the risk arising from the condition of the premises, did not take upon himself the additional risk of injury from the negligent actions of the licensor or his servants in the conduct of his business thereon.²

Evidently some principle peculiar to this particular voluntary relation of master and servant had to be found or invented to relieve the enormous burden of answering to his servants for the care and skill of their fellow employees. No case existed in which such a liability had been enforced. It was felt that the master's liability even to strangers was a hard one, imposing as it did an enormous legal responsibility upon one who might have done all he personally could to protect his neighbors; and where the person

had entered the master's employment. Therefore we find that this, the earliest of all cases, draws no distinction between a defective condition existing when the relation is created and one which supervenes thereafter.

¹ In *Priestly v. Fowler*, Parke, B., goes even further. He thinks that even a passenger by stagecoach would be in a similar position if he knew that the coachman was drunk or the horses skittish. He says: "I apprehend that the contract would only be to carry us as safely as could be in the condition in which the passenger knew the vehicle to be." See, however, the contrary view expressed by Grantham, J., in *Osborne v. R. R.*, 23 Q. B. D. 220. This *dictum* is also opposed to the view maintained in many jurisdictions that even an expressed consent to exempt a carrier of passengers from liability for its negligences or those of its servants is void as against public policy.

² *Gallagher v. Humphrey*, 6 L. T. (N. S.) 684; *Bennet v. R. R.*, 102 U. S. 577; *De Haven v. Hennessey*, 137 Fed. Rep. 472. Of course the negligence must be active, negligent misconduct toward the licensee while on the premises, — not mere antecedent negligence whereby the physical condition of the premises has been made unsafe.

claiming the benefit of this vicarious liability was not a stranger but one whose livelihood was derived from the master's business, who to the extent of his wages might be regarded as a joint adventurer therein, the hardship became even more striking. There was naturally a desire to limit its application, especially where if strictly applied it would throw an intolerable and almost prohibitive burden upon the development of business and manufacture. Commercial and manufacturing conditions were in a state of transition at this time (1837 to 1842). Railways and elaborate and intricate machinery were coming into use; the old conditions under which a few workmen worked with simple tools under the eye of the master were rapidly passing away. The contract of service afforded a convenient medium through which the master might be relieved from this intolerable burden. Into it was bodily read — because commercial necessity required it — an implied stipulation that the servant should assume the risks of the negligent acts of those fellow servants with whom he might expect to be associated, upon whose care his safety might be expected to depend.¹ Such a method was in accordance with the judicial

¹ In the first case raising this point, *Murray v. R. R.*, 1 McMull. (S. C.) 385 (1841), the fact that the injured fireman had chosen to work under the particular engineer appears to have led the court to regard the servant as assuming a known risk of his employment, the chance of such engineer's personality. In *Farwell v. R. R.*, 4 Met. (Mass.) 49 (1842), no such element existed, and the decision was based squarely on a presumption of an implied term in the contract of employment that the servant should assume among the other expectable risks that of the subsequent negligence of his fellow servant, though personally unknown to him, it being presumed that the compensation had been fixed in relation to such risks. Chief Justice Shaw's statement that the law conclusively presumes that the servant intended to bear such risks is most unsatisfying. Every legal presumption merely indicates some rule or policy of the law whereby the existence of the fact presumed becomes legally unimportant. It remains to discover what the policy of law is, which, irrespective of the consent of the servant, imposed such an assumption upon him. Chief Justice Shaw himself says in this opinion: "In considering the rights and obligations arising out of particular relations, it is competent for the courts to regard considerations of policy and general convenience, and draw from them such rules as will best promote the safety of all parties concerned. This is the basis on which implied promises are raised, being duties legally inferred from the consideration of what is best adapted to promote the benefit of all persons concerned."

An obligation so imposed by law upon a relation created by contract irrespective of the consent of the parties thereto, is in no sense a contractual obligation. It is fundamentally a law-imposed obligation, substantially a tort duty, and it is only introducing an element of confusion to speak of such obligations as originating in an implied term of contract creating the relation. That Chief Justice Shaw should give as instances of such implied contracts the extended liability of common carriers and innkeepers emphasizes this. Only nine years after this case was decided, the fallacy of regarding

tendency of the time, which was to refer if possible all obligation to the consent of the party on whom it was laid,¹ and which thus led courts to consider all duties imposed by the policy of the law on a relation created by contract as founded on some presumed fictitious term in the contract creating the relation. This exemption of the master from the operation of the maxim of *respondet superior* was alone peculiar to the relation of master and servant;² the absence of any duty on his part to remedy conditions of service which the servant knew when he entered the employment, resulted from the application to this specific voluntary relation of a principle general to all voluntary associations. Unfortunately there has been a perhaps natural tendency to confuse the two things, and so to import from the one which perhaps required it a fictitious contractual basis absolutely unnecessary to the other, and to refer all the master's exemptions and duties to some presumed term of the contract of employment.³

the duty of a carrier of passengers as rising from an implied term in the contract of carriage was fully exploded in the case of *Marshall v. R. R.*, 11 C. B. 665.

¹ This was the prevailing tendency of the courts at that era. It appears to mark the final wave of the influence of the conception prevalent during the end of the eighteenth and beginning of the nineteenth century, which referred all power of government to the social contract, and which sought to find a basis for all legal obligations in the consent, real or fictitious, of the parties upon whom they were laid. Beginning with *Marshall v. R. R.*, 11 C. B. 665, the modern tendency has been on the contrary to consider that the question as to whether an obligation is one in tort or contract depends upon whether it is imposed by the policy of the law or is created by the actual consent either expressed or necessarily implied in fact from the circumstances of the case. See *Turner v. Stallibrass*, [1898] 1 Q. B. 56, and *Clark v. The Army and Navy Stores*, [1903] 1 K. B. 155.

² Compare *Woodley v. R. R.*, L. R. 2 Exch. 384, and *Wood v. Lock*, 147 Mass. 604, with *Johnson v. Lindsay*, [1891] A. C. 371, and *Morgan v. Smith*, 159 Mass. 570. In the first of these pairs of cases, one who accepted work under known dangerous conditions was not allowed to recover, though himself a servant not of the defendant whose premises were dangerous, but of an independent contractor; while in the latter the employer of an independent contractor was held liable to the servant of such contractor for injury received through the negligent acts of his own servants though engaged in the same piece of work, the exemption from the maxim *respondet superior* being an incident peculiar to the relation of master and servant.

³ See Lord Herschell in *Smith v. Baker*, [1891] A. C. 325, and Lord Cranworth in *Bartonshill Colliery Co. v. Reid*, 3 Macq. H. L. Cas. 266.

In *Hutchinson v. R. R.*, L. R. 5 Exch. 343, Alderson, B., p. 350, adopts practically the reasoning of Shaw, C. J., in *Farwell v. R. R.* He says: "The servant knew when he engaged in the service that he was exposed to risk of injury not only from his own want of skill and care, but also from the want of it on the part of his fellow servants, and he must be supposed to have contracted on the terms that as between himself and master he would run this risk."

In *Thomas v. Quartermaine*, Bowen, L. J., alludes to the confusion which has arisen

Such a fiction is no more necessary as a basis for the master's duties to his servant than it has been seen to be as a basis for his exemption from liability for obvious defects in his plant. Wherever two persons for their mutual benefit¹ enter into a voluntary relation, he who has the ability to protect another who is unable to protect himself is bound to do so. The duty springs from the power of the one and the impotence of the other. The duty is common to all such voluntary relations. Lord Abinger has recognized, in *Priestly v. Fowler*, "the master's obligation to provide for the safety of the servant to the best of his judgment, information, and belief"; but as in the case of all voluntary relations, the duty is subject to the limitation that it extends only to the discovery and repair of conditions which are not obvious to the other party, — just as it was held by Willes, J., in *Indermaur v. Dames*,² that one who invited another upon his premises upon his own business must inspect the premises in order to discover any unusual and so unexpectable defect, since he, having the sole control of the premises, alone had the power to do so, — so it has been held that the master, since the servant is on his premises or using his plant in his (the master's) business, is bound to take care by inspection to see that the premises and plant shall not deteriorate from the condition in which they obviously were when the servant began. Here, too, the master alone has the power to make such inspection and discover such defects, the servant being absorbed in the performance of his duties. But in

from the fact that by a contract of service the workman was deemed to have taken upon himself such risks as were visible and known. He says: "This is one way of putting such a defense, and may in many cases be sufficient, but there is another way of stating it and another principle wholly independent of contract on which a similar defense arises. The law is full of instances where duties assume a double aspect, and may be viewed concurrently as arising by implication out of a contract, or as created by some wider principle of law which happens to take effect, and to receive apt illustration in the particular instance of some particular contract. It is in most cases a barren and metaphysical inquiry to discuss whether such duties are best treated as arising by implication from the contract or from the general law outside. The Employers' Liability Act of 1880 makes precision on this point necessary, and renders it important to remember that quite apart from the relation of master and servant, and independent altogether of it, one man cannot sue another in respect of a danger or risk, not unlawful in itself, that was visible, apparent, and voluntarily encountered by the injured person."

¹ Benefit is essential if the duty is to be other than a mere duty to disclose the conditions as they are known to exist. An obligation to take affirmative action to discover the true condition is based upon some benefit to him upon whom it is laid.

² L. R. 1 C. P. 274.

each case, when the defect has been discovered, the owner of the premises¹ or the master² is bound to remedy the defect or in the alternative to give the invitee or servant notice of it.

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[*To be continued.*]

¹ Kelly, C. B., *Indermaur v. Dames*, L. R. 2 C. P. 311.

² So in the Irish case of *Vaughan v. Ry.*, 12 Ir. C. L. 297, a case in which the declaration set forth that the deceased was employed to work in a passage where there was a wall of which his master had absolute control, and that while engaged in the work the wall became ruinous and fell. Pigot, C. B., held that since the declaration alleged the wall became ruinous after the plaintiff was engaged in the service, the declaration was good. Upon this statement the defendants can hardly be treated as otherwise than cognizant (probably because it was their duty to inspect so as to learn the true condition of the wall) of the altered condition of the wall, and if the wall became ruinous and dangerous while the deceased was engaged in work near it, either he ought to have been made acquainted with the change which caused the new risk to his employment, or precautions ought to have been taken to secure him from the danger. See Swayze, J., *Dowd v. R. R.*, 70 N. J. Law 452, 455. See, on the whole subject, Beven on Negligence, pp. 748-763.

PUBLIC ÆSTHETICS.

THE growth of the civic and municipal æsthetic sense has been a significant feature of recent American evolution. It has been manifested in making utility and sentimental charm go hand in hand — in selecting for parks and other public places of recreation the sites of natural beauties or wonders, thereby preserving the latter from private vandalism and greed. Systematic thought and — whatever the results — the best intentions are being devoted to the artistic opening of streets, the laying out of parks, and the exterior and interior construction of public buildings. In the mural decoration of public buildings American artists have produced a long series of pictures conceived on a heroic scale and executed with intrinsic excellence. There are two courthouses in the city of New York whose paintings and stained-glass windows render them constantly the shrine of tourists. The public cheerfully approves the expenditure of large sums in order to secure the highest talent available for work whose end is purely æsthetic.

The authority to appropriate land for parks or recreation grounds has been the most important factor in the promotion of public æsthetics. The government of the United States has assumed without question the right to dedicate to that purpose land in territories and land which it still reserved in states, and since the decision of the Supreme Court of the United States in *United States v. Gettysburg El. Ry. Co.*,¹ it has seemed highly probable that the federal government might, in proper cases, exercise a power comparable in breadth to that of the states. It was held that an appropriation by Congress for locating and preserving the lines of battle at Gettysburg, Pennsylvania, and further developing and beautifying the site, — as, for example, by the erection of monuments and tablets, — is an appropriation for a public use, and that in the promotion of such use the United States may, in the exercise of eminent domain, condemn and take the necessary lands of individuals and corporations.

Previous to that decision it was doubted whether the federal government could exercise the right of eminent domain for any-

¹ 160 U. S. 668.

thing beyond strictly utilitarian ends, such as the acquirement of land for custom-houses, post-offices, etc. Indeed, the decision of the same case in the Circuit Court of Appeals,¹ which the Supreme Court reverses, took that restricted view. Mr. Justice Peckham, speaking for a unanimous bench, discourses with considerable eloquence upon patriotism, its value as a national asset in time of need, and the legitimacy of fostering it by tangible memorials. His concluding words on this branch of the discussion are of general significance:

"No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.

"It is needless to enlarge upon the subject, and the determination is arrived at without hesitation that the use intended as set forth in the petition in this proceeding is of that public nature which comes within the constitutional power of Congress to provide for by the condemnation of land."

The spirit of this language would seem broad enough to authorize by analogy the exercise of eminent domain for any important but purely sentimental purpose where federal action was alone open or would be most effectual. An æsthetic public purpose is comparable in kind to a patriotic public aim, and in the one quite as much as in the other a utilitarian element inheres. Positive beauty and freedom from deformity enhance the value of possessions national, state, and municipal. Localities that charm the senses will attract visitors and purchasers and constantly tend to appreciate pecuniarily. The utilitarian side of public æsthetics is highly potential in the attractively planned and constructed city, though not there so palpably and sordidly displayed as by summer boarding-house keepers who make money out of the mountains and the lakes.

Upon the question of national authority it is of interest that a joint international commission has been appointed by the United States and the Dominion of Canada to rescue Niagara Falls from threatened injury through commercial vandalism. Pursuant to a joint resolution of Congress, the American members of the com-

¹ 67 Fed. Rep. 869.

mission have reported what action in their judgment is necessary and desirable to prevent the further depletion of water and otherwise to preserve Niagara Falls. The probable outcome of the negotiations will be a treaty between Great Britain and the United States, "having for its purpose the preservation of all the natural scenic features of the falls of Niagara by prohibiting or duly restricting the diversion of the waters of the Niagara River above the falls." Under date of October 14, 1905, the Attorney-General, advising the President, wrote in part as follows:

"As to the ground for federal intervention, so far as proposed, I think there can be no fair doubt. Strictly, of course, since the water withdrawn from the river above the falls is taken below the farthest navigable point on that side and is returned to the river (subject to a negligible amount of waste) below the falls above its navigable portion on that side, the equal and free rights in the stream as a navigable waterway in the Great Lakes system which were assured by the ordinance of 1787 are not at all imperilled. Nevertheless, I think that the character of Niagara Falls as one of the greatest natural wonders, its situation in a boundary river on the frontier of a foreign country, its undoubted historical relation as a natural possession and common heritage, all these elements in the case would fully justify you in proposing through the ordinary diplomatic channels the consideration of this subject by the two Governments immediately concerned."

On March 27, 1906, President Roosevelt, in submitting the report of the American members of the commission to Congress, said:

"I earnestly recommend that Congress enact into law the suggestions of the American members of the International Waterways Commission for the preservation of Niagara Falls, without waiting for the negotiation of a treaty. The law can be put in such form that it will lapse, say in three years, provided that during that time no international agreement has been reached. But in any event I hope that this nation will make it evident that it is doing all in its power to preserve the great scenic wonder, the existence of which, unharmed, should be a matter of pride to every dweller on this continent."

Here it will be seen that the substantial ground for action is æsthetic, and not commercial or utilitarian, the fact that the Niagara River forms an international boundary line affording legal occasion and justification for the exercise of federal power.

A few years ago it was proposed that the United States take steps to preserve the Palisades along the Hudson River from the depredations of quarrymen. The greater and most beautiful part of the Palisades is in New Jersey, while the view is had either from

New York opposite or the river between. New York could not condemn land in another state; New Jersey pleaded poverty, and contended that it would be a hardship to compel its people to pay for a fine prospect to be enjoyed outside of its boundary lines. At the time of the origin of the movement *United States v. Gettysburg El. Ry. Co.* had been before the Circuit Court of Appeals, where federal authority to condemn land for preserving the site of the Battle of Gettysburg was denied, and the Supreme Court of the United States had not yet reversed the decision. In agitating for national action it was therefore taken for granted that a purely sentimental use could not be a public use authorizing the exercise of eminent domain. It was accordingly proposed that the United States acquire the Palisades as a military post, and it was argued that long-distance artillery placed upon that height could very effectively deal with foreign invading vessels in time of war. This contention was realized to be more or less of a subterfuge and the movement for federal aid was in time abandoned. Efforts were continued, and indeed are still on foot, to accomplish the end through co-operative state legislation and private subscription. Faltering and clumsy as this policy naturally has been, there is ground for hope that it will be successful in substantially preserving the Palisades.

While the right to take land within a state may not be so clear as the authority to deal with the Niagara River by virtue of the international treaty-making power, it seems highly probable, under the broad language of Mr. Justice Peckham, that the Supreme Court would sanction federal action with regard to the Palisades, and it is submitted that on principle an æsthetic use should, in the same manner as a patriotic use, be treated as a legitimate public use within the federal power of acquirement and permanent trusteeship.

The authority of a state or municipality, under state sanction, to appropriate or acquire land for public parks or recreation grounds is practically plenary. The promotion of public health is often directly, and perhaps always at least indirectly, involved. But health considerations are not at all essential for the legality of state action. At the opening of his opinion in *Shoemaker v. United States*¹ Mr. Justice Shiras remarks that "in the memory of men now living, a proposition to take private property without the

¹ 147 U. S. 282 (1892).

consent of its owner for a public park and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power." He proceeds, however, to show, by abundant citation of state court decisions, that such power is now universally recognized, and "that land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health, or business, is taken for a public use."

A public park once established is to be held sacred to the ends of recreation and æsthetic gratification. Business enterprises which are incidental to the use or enjoyment of a park may be licensed to be conducted in or about it, but business *per se* is to be rigidly excluded. Perhaps most of the decisions are negatives in that they deny injunctions, because the kind of business in question would legitimately contribute to the comfort or convenience of visitors to the park. These negatives are, however, pregnant in their implied condemnation of trades not affected with any public use and which would exist solely for the profit of their proprietors. A notable decision granting an injunction was made comparatively recently at a special term of the New York Supreme Court.¹ The case was never appealed so as to receive the consideration of a court *in banc*. Mr. Justice Francis M. Scott, however, who decided the matter at the special term, wrote an opinion which forms a valuable contribution to a subject upon which legal literature is not very voluminous. The theoretical scope of the decision is perhaps limited by the circumstance that it was made under and interpreted a special statute, being section 612 of the present charter of the city of New York. That clause defines the duties of a park commissioner as

"to maintain the beauty and utility of all such parks, squares, etc., and to execute . . . all measures for the improvement thereof for ornamental purposes and for the beneficial uses of the people of the city."

Thus it will be seen that the protection of æsthetic features is expressly commanded. The action was to enjoin the use of a fence surrounding a portion of one of the parks for advertising purposes by means of placards, signs, and billboards, under a license a park commissioner had assumed to grant. The court held that the use was illegal, the license void, and that the injunc-

¹ *Tompkins v. Pallas*, 47 N. Y. Misc. 309.

tion should be granted. Although, as has been said, the decision was under a particular statute, it is believed that Mr. Justice Scott's reasoning, fortified by a former New York decision cited by him, is broad enough to cover cases of all public parks. If it be not definitely settled that disfiguring public parks by advertisements is illegal, at least it can be said that the trend of authority is strongly in that direction, and that it is highly probable that such position will be taken in future cases. The following language from Justice Scott's opinion is worthy of reproduction:

"A public park has been defined by the Court of Appeals as 'a piece of ground enclosed for purposes of pleasure, exercise, amusement, or ornament,'¹ and commissioners charged with the care of such parks have often been held justified in granting licenses for the maintenance within parks of such conveniences as would enhance the opportunities of the public to use and enjoy the parks as places of resort, amusement, recreation, and exercise. In every case, however, in which the exercise of this power has been sustained it has been because the use authorized has in some way contributed to the use and enjoyment of parks by the public. The defendant Pallas gives in his affidavit opposing this motion a list of some of the licenses heretofore granted with respect to the city's parks, including restaurants, refreshment stands, boats, stages, boathouses and flower-stands. This very list of itself shows that heretofore the issue of licenses has been limited to objects which would tend to afford additional facilities for the beneficial use and enjoyment of the parks by the public, and have come to be generally recognized as appropriate aids to the full enjoyment of public pleasure grounds. No such claim can be made for the advertisements of which the plaintiff complains. It is too obvious to require demonstration that business advertisements painted upon a board fence contribute nothing to the beneficial use of the park by the public. The defendant commissioner, then, had no authority, either by the express terms of any statute or by any reasonable implication, to grant a license for the exhibition of the advertisements, and his attempt to do so was illegal and void."

Assuming, therefore, the right to protect and promote æsthetic ends on public property, whether buildings, streets, or parks, the legal crux arises as to the control of private property in the interest of the general sense of beauty. Here there is a dearth of affirmative precedents. Indeed, the only actual decision authorizing positive action within the writer's knowledge is that in the famous Copley Square case by the Supreme Judicial Court of

¹ *Perrin v. New York, etc., R. Co.*, 36 N. Y. 120.

Massachusetts.¹ That case recognized the validity of a legislative act of Massachusetts limiting the height of buildings "now being built or hereafter to be built, rebuilt, or altered," on streets adjoining Copley Square in the city of Boston, upon making suitable compensation to owners for injuries sustained through the impairment of the use of their property. Incidentally, also, the regulation of the right to erect towers, domes, sculptured ornaments, and chimneys extending above ninety feet, the limit fixed for buildings themselves, was approved. The kernel of the reasoning of the court lies in the following language:

"The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to administer, not only to the grosser senses, but also to the love of the beautiful in nature in the changing forms which the changing seasons bring. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting and, in the highest sense, educational. If wisely planned and properly cared for they promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care and adornment of them to make them beautiful and enjoyable. Their æsthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park do not also justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed and whose love of beauty is being cultivated. It is argued by the defendants that the Legislature, in passing this statute, was seeking to preserve the architectural symmetry of Copley Square. If this is a fact, and if the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land against the will of the owner. But if the Legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the Commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the law-making power might not determine that this was such a matter of public interest as to call for expenditure of public money, and to justify the taking of private property."

The court cites as approximate precedents cases of the expenditure of public money for patriotic purposes, as the erection of monuments, statues, gates, or arches, or even a memorial

¹ Attorney-General v. Williams, 174 Mass. 476.

hall.¹ There may also be added as kindred examples of intangible public uses statutes that have been upheld prohibiting the use of a representation of the Arms or Great Seal of a state, or of the flag of the United States, for commercial advertising or trade-mark purposes.²

It seems only a natural step — indeed, considering the growth of the æsthetic sentiment, an inevitable step — from recognizing sentimental public uses of a patriotic or historical nature to the allowance of purely æsthetic uses, as was done in *Attorney-General v. Williams*, *supra*. As above stated, no other case exactly in point is known, but there has been very wide discussion of the *Williams* case in periodicals and by text writers, and, so far as the writer is aware, its doctrine has been universally approved. Some uncertainty was expressed in the opinion whether the end in view might not have been legally accomplished under the police power, without compensation, instead of through the exercise of eminent domain. The subsequent decision by the same court in *Parker v. Commonwealth*,³ while it does not squarely pass upon the question, intimates that the right to proceed under the police power would have been at least gravely doubtful. Such doubt has been emphasized by a series of cases in different states holding that a legislature has no power to authorize a municipal corporation to prohibit the placing of signs or advertisements upon private property, or fences enclosing private property, or to limit the height and form of enclosures of private property, from merely æsthetic motives.⁴

The purport of these judicial utterances — the authorities on the subject are believed to be in unbroken harmony — is that statutes or ordinances interfering with the use of private property may be upheld under the police power, if their purpose can reasonably be perceived to be the promotion of the public health, comfort, or physical convenience, but if the aim be merely the suppression of an eyesore, they will constitute an unconstitutional invasion of individual rights.

¹ *Kingman v. Brockton*, 153 Mass. 255.

² *Comm. v. Sherman Mfg. Co.*, 75 N. E. Rep. 71 (Mass.); *Halter v. State*, 105 N. W. Rep. 298 (Neb.).

³ 178 Mass. 199.

⁴ *New Jersey, etc., Co. v. Atlantic City*, 58 Atl. Rep. 342 (N. J.); *Passaic v. Paterson, etc., Co.*, 62 Atl. Rep. 267 (N. J.); *Chicago v. Gunning System*, 73 N. E. Rep. 1035 (Ill.); *People v. Green*, 85 N. Y. App. Div. 400. Also see many cases cited in *Passaic v. Paterson, etc., Co.*, *supra*.

In his work on Police Power Mr. Ernst Freund remarks: ¹

"It is generally assumed that the prohibition of unsightly advertisements (provided they are not indecent) is entirely beyond the police power, and an unconstitutional interference with rights of property. Probably, however, this is not true. It is conceded that the police power is adequate to restrain offensive noises and odors. A similar protection to the eye, it is conceived, would not establish a new principle, but carry a recognized principle to further application."

The analogy to offensive noises and odors is *a priori* clear enough. The difficulties in the way of effectuating it are, first, the substantive one of interference with constitutional rights, and it may be said that some of the decisions in billboard cases above cited have been made since the publication of Mr. Freund's book. Moreover, by custom and legal adjudication, the maintenance of advertising signs in windows or on outside walls of buildings ranks as a very material business factor.

Second, there is a practical difficulty to which Mr. Freund himself calls attention. He remarks in a note to section 182 that although the power to restrain unsightly signs be conceded,

"the manner of its exercise would give rise to constitutional difficulties. Under our government system these regulations would have to proceed from the legislative authority of either state or locality. Such regulations would have to define what signs are prohibited, and some test would have to be discovered by which to discriminate that which is merely unæsthetic from that which is so offensive as to fall under the police power, since the prohibition of all advertising signs would be out of the question."

It is believed that both on theoretical and practical grounds the law must be taken as settled that, although public æsthetic ends may be effectuated by statute or ordinance through the exercise of eminent domain, the same object may not be accomplished by legislation under the police power without compensation.

It does not, however, follow that the analogy to offensive sounds and odors will always remain utterly futile. It is submitted that judicial power might be exercised under the facts of a given case to restrain a particular advertisement, or collection of advertisements, as a nuisance. An inherently lawful business may constitute a nuisance because of the manner or place in which it is conducted. It is entirely possible that the increasing æsthetic

¹ § 182.

sentiment will, in time, sanction the judiciary in taking cognizance of particular nuisances, as is now done with nuisances of noise and smell. It is well settled that courts may take notice that the standard of comfort differs according to the situation of property and the class of people who inhabit a locality. In this country, as well as in England, the character of a neighborhood — whether residential or business — is vitally important on the question of nuisance. Accordingly, it might be determined that advertisements that disfigured a certain neighborhood entirely devoted to residence fell within the purview of progressive equitable jurisdiction.

The suggestion has also been made that advertisements may be controlled through the taxing power. There is no good reason why that form of business enterprise should not be taxed, and taxed heavily. It is already obnoxious to the æsthetic sense of the community, and is daily becoming more so. If billboard advertisements must exist, the public might as well derive a revenue from them, and if the tax be made substantial and graded according to the space employed, it may indirectly tend toward diminution of the evil itself. Such legislation would be analogous in policy and effect to liquor tax laws. A statute applying generally to all use of billboards and with uniform regulation as to gradation of tax would doubtless be constitutional. It is improbable, however, that the abuse could be entirely suppressed through taxation. Chief Justice Marshall's famous *dictum*¹ that the power to tax involves the power to destroy has been materially limited in its application.² The present writer shares the doubt expressed by the author of the note in *Cooley on Taxation*³ whether an affirmative exercise of nominal taxing power would be justified that has not revenue in view, "but is only called a tax in order that it may be employed as an instrument of destruction."

There is one form of advertising for the suppression of which it is believed judicial power might even now be exercised. The custom has sprung up in cities of covering the whole side or front of a building with advertisements pictured or lettered in electric lights. Persons dwelling near these flamboyant displays must feel as if they were passing their nights in the Land of the Midnight Sun. The glare is, of course, intensely disagreeable, and further-

¹ *McCullough v. Maryland*, 4 Wheat. (U. S.) 431.

² *Knowlton v. Moore*, 178 U. S. 41, 60.

³ 3d ed., 14.

more it must interfere with sleep in the early hours of the night as seriously as noises do.¹ This would be especially true in the summer season, when comfort calls for open windows. It would seem that particular advertisements of this kind might be restrained as nuisances, not merely on æsthetic grounds, but because sleeplessness and broken rest impair the health. Indeed, general ordinances against advertisements of that class might be upheld as health laws.

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¹ Hill v. McBurney, 38 S. E. Rep. 42 (Ga.).

A STUDY IN THE LAW OF TORTS.

THE owner of a tract of land which was bounded on two sides by a circuitous river, brought six separate actions against six mining companies, to recover compensation for alleged damage done to the land by the deposit of tailings from the tin mines of the six defendant companies into the river, and the subsequent carriage of a portion of such tailings on to the land by the river in flood-time. The portion of the tailings which was carried on to the land by the river was deposited on it in the form of a fine red silt which made a layer of red soil on the surface of the land, varying in thickness in accordance with the contour of the land. By the consent of all the parties the six separate actions were tried together, without a jury, and in each case the trial resulted in a judgment in favor of the defendant company. The land was let to a tenant who used it for pastoral purposes, and who had occupied it for more than six years before the commencement of the actions; and the ground of the judgment, in each case, was that the evidence did not prove that a quantity of silt sufficient to cause any appreciable damage to the plaintiff's reversionary interest in the land had come from the tailings deposited in the river by the defendant company. The silt which came from the mines of several of the defendant companies was not composed of any ingredients deleterious to the land of the plaintiff. On the contrary, it was composed of ingredients that would have made it a beneficial addition to the land if it had been deposited on it in convenient quantities at a convenient season of the year; and it did not appear that the silt which came from the mine of any of the other defendant companies was of a character positively deleterious to the plaintiff's land.

The several mines of the six defendant companies were situated at distances varying from six to forty miles above the plaintiff's land, as measured by the course of the river; and the mine nearest to the plaintiff's land was a very small one, from which a very small quantity of tailings had been deposited in the river. The next nearest mine was about twelve miles above the plaintiff's land, and it had been worked on a much smaller scale of operations than that on which mining operations had been conducted in the mines

above it. Judging from the color and composition of the silt deposited on the plaintiff's land, the greater part of it appeared to have come from the mines more than thirty miles above the land.

The character of the damage which the plaintiff alleged to have been caused to his land by the deposit of the silt upon it was a repeated interference with the natural growth of the herbage growing on it, and a repeated covering of the herbage with a thin layer of silt which prevented the cattle from eating it until subsequent rains had washed the silt from it; in consequence of which he had been compelled to reduce the rent of the land, and had therefore sustained pecuniary loss through the conduct of the defendant companies.

The refusal of the tenant to continue to pay the same rent which he had previously paid for the land was relied upon by the plaintiff as conclusive evidence that his reversionary interest in the land had been appreciably injured. But in the cases of *Mumford v. The Oxford, Worcester and Wolverhampton Railway Company*¹ and *Simpson v. Savage*² it was definitely decided that the relinquishment of a property by a tenant, in consequence of the tortious conduct of the occupier of an adjoining property, and the inability of the owner of the relinquished property to obtain another tenant at the same rent as that paid by the previous tenant, was not sufficient proof *per se* of such a permanent injury to the property as would enable the owner of it to maintain action for damages in respect of his reversionary interest in it. In each of those cases the tenant could undoubtedly have maintained an action for the inconvenience and discomfort suffered by him in consequence of the conduct of the defendant; and in each of the six cases now under review the tenant could have undoubtedly maintained an action against the defendant company for a technical trespass at the least, and he could also have maintained an action for substantial damages, if in any one of the six cases he could have proved that he had suffered appreciable damage from a repeated interruption of his ordinary use of the land, by the deposit of only so much silt as could be reasonably supposed to have come from the mine of the particular defendant. But the owner of the land failed, in each of the six cases, because the judge came to the conclusion that the evidence did not establish the allegation of anything in the nature of a permanent or continuing damage to the land in consequence of the separate conduct of the particular defendant.

¹ 1 H. & N. 34.

² 1 C. B. (N. S.) 347.

If all the mines on the banks of the river had belonged to one company, or if they had been worked in conjunction in such a manner that the deposit of tailings in the river from any one of them was an act performed with the knowledge and for the benefit of the owners of all of the other mines, the plaintiff undoubtedly would have had a good cause of action against the single company, or the combination of companies, as the case might be. But each of the six defendant companies, in the cases above mentioned, was conducting its mining operations quite independently of all the other defendants, and none of them could be said to be legally cognizant of the operation carried on by any of the others. In such a case it seems that the owner of a reversionary interest in any land that is leased for a term of years to a tenant, and which is substantially injured by the aggregate operations of several persons who have acted independently of one another, cannot join any two or more of such persons as defendants in a single action for damages, and is therefore without a remedy in the nature of an action for compensation, if he cannot prove that an appreciable portion of the injury done to his land has been caused solely by the conduct of the single defendant in any action he may bring to obtain compensation for the loss he has sustained.

The evidence produced by the six defendant companies in the six cases now under review clearly proved that a much larger quantity of tailings than the total amount deposited by them in the river had been deposited in it by other companies and by a number of single persons, in the working of mines which had been abandoned some years before the actions were commenced; and that only a small portion of the tailings deposited in the river from time to time, in the working of a mine thirty or twenty miles above the plaintiff's land, would be carried by the river so far down its course, within a period of six years from the time of deposit of it in the river. An inspection of several miles of the bed and banks of the river demonstrated conclusively that a very large portion of the total quantity of tailings deposited in the river, during the previous twenty years, had remained permanently in the bed of the river, and had raised the level of it, in many places, as much as seven or eight feet above the original level of it. It was also proved that it was not until mining operations had been carried on for some years in several mines situated on the banks of the river, that any appreciable quantity of silt had appeared on the plaintiff's land. From these facts, and from a large quantity of expert evidence in

reference to the character and condition of the bed and banks of the river and the operation of floods upon the tailings deposited into it, the judge arrived at the conclusion that the silt appearing from time to time upon the plaintiff's land, in any case in which it came from a mine twenty miles or more distant, came from tailings that had been deposited in the river some years before the silt reached the land, and that silt would also be carried from time to time on to the plaintiff's land from the banks of the river independently of any mining operations. The quantity of silt carried on to the plaintiff's land from the banks of the river, without any disturbance of them by mining operations, would usually be very small, in fact almost imperceptible; but it was proved that on several occasions, within a period of ten or twelve years before the commencement of the actions, very heavy floods had torn away large quantities of soil from both banks of the river nearer to the plaintiff's land than the mines of some of the defendant companies. It was, therefore, a very safe inference that on several occasions, within the six years immediately preceding the commencement of the actions, some of the silt deposited on the plaintiff's land had come from the banks of the river.

In view of the conclusion of fact at which the judge arrived, in reference to the quantity of silt brought on to the plaintiff's land from the mine of any one of the six defendant companies, within a period of six years before the commencement of the actions, it was impossible for him to declare that the conduct of any one of the defendant companies, regarded apart from the contemporaneous conduct of the other defendants, had caused any injury to the plaintiff's reversionary interest in the land. It was also very problematical whether the total quantity of tailings deposited by all the six defendant companies in the river, within any particular period of six years, would have caused any substantial and continuing damage to the plaintiff's land, if there had not been any other tailings deposited at any time in the river from other mines. But, assuming that the total quantity of soil brought down on to the plaintiff's land by the river from all the mines of the six defendant companies, and from all the other mines which were being worked on the banks of the river at the same time, was sufficient to cause a substantial and continuing injury to the plaintiff's land, the important question suggested by the judgment in each case is, whether the plaintiff could have obtained an injunction to restrain the owners of the several mines from continuing to deposit silt in

the river, if the quantity coming from any one of the mines was insufficient to cause any actionable injury to his reversionary interest in the land.

There is ample judicial authority in support of the proposition that the equitable remedy of an injunction is always a concurrent remedy for a wrong actionable under the common law. In the case of *White v. Mellin*,¹ Lord Herschell said, in reference to the application made in that case for an injunction to restrain the further publication of an advertisement which the plaintiff alleged was disparaging to an article manufactured by him, "My Lords, obviously to call for the exercise of that power, it would be necessary to show that there was an actionable wrong well laid, and if the statement only showed a part of that which was necessary to make up a cause of action—that is to say, if special damage was not shown—a tort in the eye of the law would not be disclosed, the case would not be within those provisions, and no injunction would be granted." In the same case Lord Watson said, "Damages and injunction are merely two different forms of remedy against the same wrong; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second." And, in direct reply to the argument of the plaintiff's counsel, Lord Morris said, "But it was said that although an action for damages could not be sustained an injunction in equity could be obtained. It would certainly be a strange and novel chapter of equity if a party could get a perpetual injunction to restrain an act which is not an illegal act." Judicial language could not be more emphatic in regard to any proposition which it enunciated. But in the case of *White v. Mellin* it was only the conduct of a single defendant which was under the consideration of the court, and the plaintiff did not prove that he had suffered any positive damage, or that the conduct of the defendant was *per se* an invasion of any legal right vested in the plaintiff. If the circulation of the advertisement published by the defendant had caused any diminution in the volume of the plaintiff's business, the case was an example of *damnum sine injuria*. In any such case, the emphatic language used by several of the judges in reference to the necessity of proof of an actionable wrong in order to support an application for an injunction would always be justified and appropriate. But it has never been judicially decided

¹ [1895] A. C. 154.

that an injunction will not be granted in any case in which the result of the simultaneous conduct of a number of defendants, acting independently of one another, is to produce positive damage to the property of the plaintiff, if the conduct of each of the defendants is separately innocuous to the plaintiff. On the contrary, in the two cases of *Thorpe v. Brumfitt*¹ and *Blair v. Deakin*,² it was decided that two or more persons, acting independently in the pollution of a river, can be joined as defendants in one suit for an injunction to restrain them from continuing to pollute it to the detriment of the plaintiff, although the matter deposited in the river by any one of them would not produce any appreciable pollution of it. It was also decided in the case of *Lampton v. Mellish*³ that two or more persons, acting independently of one another, could be joined as defendants in a suit to restrain them from making a noise to the discomfort of the plaintiff, although the noise made by one of them alone would not have caused any serious inconvenience to the plaintiff.

In the last three mentioned cases the conduct of each defendant was technically an invasion of a legal right vested in the plaintiff. But in a jurisdiction in which the same tribunals take cognizance of both legal and equitable rights, and administer simultaneously legal and equitable remedies, there does not seem to be any sufficient reason why a substantial injury to a reversionary interest in land should not be regarded as a remediable wrong, although it may be produced by the simultaneous conduct of a number of persons in circumstances in which the separate conduct of each of them is not an actionable invasion of any present right of the reversioner, if the separate conduct of each of the contributors to the injury to the reversioner's interest in the land is an actionable invasion of a legal right of the person in immediate possession of it. If the injury inflicted in such a case upon the reversioner's interest in the land is not a remediable wrong, it is *damnum sine injuria*. But in all cases in which *damnum sine injuria* is recognized as such by the law, the *damnum* is produced by the exercise of a legal right vested in the person whose conduct causes it. If in any case *damnum* is suffered by any person as an immediate consequence of the conduct of another person which is not an exercise of a legal right vested in him, such conduct is *injuria*, or in other words is an actionable invasion of a legal right of the person who

¹ L. R. 8 Ch. 650.

² 57 L. T. 522.

³ [1894] 3 Ch. 163.

has suffered *damnum* in consequence of it. In the case of substantial damage done to a reversionary interest in land by the simultaneous conduct of a number of persons in the circumstances above mentioned, the *damnum* would not be produced by the exercise of any legal right vested in the several contributors to it, if the person in immediate occupation of the land would have a good cause of action against them for damage to his interest in it. On the contrary, the conduct of each of the contributors to the damage would be a direct invasion of a legal right vested in the person in immediate possession of the land, and would therefore be intrinsically an actionable wrong in relation to him, and if in such a case the reversionary interest of the owner of the land is also injuriously affected, it is difficult to see why each contributor to the damage should not be restrained by injunction from continuing to contribute to it, when an injunction is obtainable, in cases like *Thorpe v. Brumfitt*, *Blair v. Deakin*, and *Lampton v. Mellish*, to restrain each contributor of an inappreciable quota to a substantial nuisance.

The common law does not provide preventive remedies, because its purview does not extend beyond deeds done and the results produced by them; and it does not impose any liability on any person for any deed not done by him, or authorized or adopted by him, in any manner or degree, or by any person to whose legal rights and liabilities he has succeeded by operation of law. Nor does equity, when it restrains by an injunction several persons who have been acting independently of one another, impose on any of them any responsibility for the conduct of any of the others. There is, therefore, not any conflict between the common law and equity in this matter, in regard to the distribution of liability for the results of the aggregate conduct of two or more persons. But equity will frequently restrain a person from pursuing conduct which does not *per se* produce damage to any other person, when an extension of such conduct would produce actionable damage to another person. In every such case there is doubtless a threatened or an imminent invasion of a legal right of the plaintiff. But in the case of *Blair v. Deakin* Mr. Justice Kay said that an injunction could be obtained to restrain the doing of an act perfectly innocuous in itself to any person, if the doing of it simultaneously with an equally innocuous act done by another person, contributed to a result injurious to the plaintiff.

The conduct of each of the six defendant companies in the six actions above mentioned would have clearly amounted to actionable *injuria* to the plaintiff's reversionary interest in the land, if it had been sufficiently extended to produce a more substantial amount of its natural and inevitable consequences in the circumstances in which it took place. It was therefore not the intrinsic character of the conduct of each of the defendant companies that exempted it from liability at the suit of the plaintiff; and, in this aspect of it, the conduct of each of the defendant companies was clearly different in character from the kind of conduct which produces *damnum sine injuria* in all the cases in which it is recognized as essentially such. But the wrongful and consequently actionable character of conduct frequently depends upon the extent of it. It is so in regard to the conduct which, in the majority of such cases, produces an actionable nuisance. It is so also in regard to the use of some particular facilities or privileges which are open to everybody, or to a definite number of persons, such as the use of a public road, or the use of the water of a river by the riparian proprietors of the land which it flows past.

The common law permits the existence of *damnum sine injuria* in all those cases in which one man suffers a loss in the pursuit of his business, or in the use of his property, by the conduct of another person in the pursuit of his business, or in the use of his property, and in which there is not any trespass to any property of the person who suffers the loss; and the doctrine or maxim of the common law which is applicable to those cases is that the public benefit is to be preferred to any private profit. In other words the common law permits the existence of *damnum sine injuria* in such cases on the ground of public utility, in the sense of the greater good for the greater number of persons. In fact it may be said that the promotion of the public good, in the sense of the greater benefit to the greater number of the members of the community, is the basis upon which the common law regulates the exercise of all private proprietary rights, in all cases in which other persons may be affected by the exercise of them; and in this matter equity clearly follows the common law, when it grants an injunction to restrain conduct which would be practically a monopoly use by one or a few persons of a right common to everybody, or to a definite class of persons upon whom the common law confers it. The application of the doctrine of public utility may appear at first sight to be somewhat obscure in such

a case as *Smith v. Kenrick*,¹ in which the tenant of one of two adjoining coal mines was held to have acted strictly within his legal right when he removed a horizontal bar of coal in his own mine, in the course of the proper working of it, although the consequence was to allow an accumulated quantity of water, which had come from a natural spring, to flow into the adjoining mine and to damage it. But if the law had allowed the plaintiff in that case to recover compensation from the defendant, it would have awarded a preference to the private right of the plaintiff to work his coal mine in the manner most advantageous to him, as against the private right of the defendant to work his coal mine in the manner most profitable to himself. In order to make the defendant liable to compensate the plaintiff, it was necessary for the plaintiff to prove that the defendant had been guilty of a violation of a duty which he owed to the plaintiff. But the court held that the defendant did not owe any duty to the plaintiff to abstain from removing the horizontal bar of coal in his own mine, and therefore his right to remove it was equal in the estimation of the law to the right of the plaintiff to work his mine without interference from any other person. Nevertheless the plaintiff suffered a serious loss from the removal of the bar of coal in the defendant's mine; and if anything in the nature of a juristic justification must be found for the refusal of the law to confer a right of action for the loss sustained by the plaintiff, there does not appear to be any such justification more consistent with the law's general recognition and protection of private proprietary rights, than the doctrine that the public benefit is better served in such a case by a refusal to award a preference to one of two conflicting rights, than it would be by any attempt to discriminate between them, upon the basis of any supposed benefit to the public in consequence of the nature of the right to which the preference would be awarded. The same observations are equally applicable to the cases of *Acton v. Blundell*² and *Chasemore v. Richards*.³

But if the doctrine of public utility is to be invoked in support of the denial of a remedy by injunction in such cases as those of the actions brought against the six mining companies above mentioned, it involves the proposition that public utility requires that mining operations should be permitted to the detriment of agricultural or pastoral pursuits, wherever it is impossible to carry on both

¹ 7 C. B. 515.

² 12 M. & W. 324.

³ 7 H. L. Cas. 349.

of them in the same locality without detriment to one of them. Such an application of the doctrine of public utility to the particular facts of those cases would permit a single person or company to carry on mining operations in a manner that would inflict injury on land used for agricultural or pastoral purposes. It would also logically permit any interruption of a tenant's use of land for agricultural or pastoral purposes, whenever the successful result of mining operations required it. The result of such an application of the doctrine of utility would introduce a discrimination in favor of the use of land for a special purpose which is now unknown to the common law, and which, in many cases, would probably be found to operate to the public detriment rather than to the public welfare. But this result seems nevertheless to be the inevitable alternative to a denial of a remedy by injunction to a reversioner in such cases as those above mentioned.

A. Inglis Clark.

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C. C. LANGDELL, Dean of the Harvard Law School from 1870 to 1895, died at his home in Cambridge on Friday, July 6, 1906, at the age of eighty. He had seemed in his usual health on going to bed the previous evening, and in the early morning the temporal imperceptibly became the eternal sleep. In a narrow sense it cannot be said of him that his work was finished. His labors continued up to the night of his death, and the storehouses of his brain were not yet exhausted. But in a wider sense his task was done. He lived to see legal education throughout the country established on the foundations which he built; his disciples justifying him in seats of authority.

In another place are given the tributes of some who knew him in his active life at the school, — his pupils and associates. The present generation of students came too late to feel his personal influence; yet all have experienced his power working through others. Every man that in the past thirty-five years has studied here owes him much, and the debt due him will grow with each succeeding class.

The REVIEW acknowledges with deep gratitude its great indebtedness to him.

AN ENGLISH APPRECIATION. — Sir Frederick Pollock has written for the October *Law Quarterly Review* a notice of Professor Langdell's death in which he says in part: "The Editor of this Review had the opportunity of saying something about Langdell in his own place in 1895 (11 L. Quar. Rev. 326). . . . Nothing has happened to alter his opinion that Langdell's genius for the pure logic of the common law was unique or almost

unique in our time. In the last years of Langdell's life the same keen analytical power was applied to the leading conceptions of equitable jurisdiction. The little book on Equity Pleading published many years earlier is still not much known among English lawyers, but it goes to the root of the matter far more thoroughly than any other modern treatise known to us, though probably there is no other so short."

THE LAW SCHOOL. — Principally owing to the ill health of Professor Brannan, several changes have been made in the leadership of the courses. Mr. P. L. Miller, of last year's REVIEW board, will give Bills and Notes, and Professor Beale will give Damages. Dean Ames will conduct the course in Partnership, and Mr. C. F. Dutch, of the 1905 REVIEW board, the course in Equity III. Whether Quasi-Contracts will be given will probably depend upon Professor Brannan's ability to resume his duties in the middle of the year. In the extra courses Mr. A. R. Campbell, of the 1902 REVIEW board, will lecture on New York Practice, and Mr. J. L. Stackpole, of the 1898 REVIEW board, will give a course in Patent Law. Professor Winter has returned, and will conduct classes in Voice Training and Extemporaneous Speaking.

LACK OF MUTUALITY OF REMEDY AS A DEFENSE TO SPECIFIC PERFORMANCE. — By the old orthodox rule, unless the defendant should in turn be entitled to an equitable remedy, the plaintiff took nothing by his bill for specific performance.¹ This remedy must have existed when the contract was made. Subsequent accrual of it to the defendant did not add the requisite mutuality;² subsequent loss of it to him, even by act of God,³ much less by his own laches,⁴ did not remove it. Two classes of exceptions were allowed. It was an answer to the plea that the plaintiff, though not so compellable in equity, had performed in full;⁵ likewise, that he had elected to proceed with a contract voidable at his option.⁶ Thoughtful courts have in part demolished these artificial rules. Mutuality of equitable remedy is no longer generally demanded,⁷ nor need it exist at the time of the bargain.⁸ A recent federal decision, however, restates the former of these discredited doctrines. *General Electric Co. v. Westinghouse Electric Co.*, 144 Fed. Rep. 458 (Circ. Ct., N. D. N. Y.).

In passing upon a bill for specific performance, certain considerations must commend themselves to the Chancellor. If the defendant has already had full performance, it no longer lies in his mouth to talk remedies. Further, if some remedy lie open to him, adequate either to assure him counter-performance or to compensate him on breach, he may not be heard to quibble over the precise form it shall take.⁷ Still less is it an

¹ *Cooper v. Pena*, 21 Cal. 403.

² *Norris v. Fox*, 45 Fed. Rep. 406.

³ *Stapilton v. Stapilton*, 1 Atk. 2; *Moore's Admrs. v. Fitz Randolph*, 6 Leigh (Va.) 175.

⁴ *Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Cas. 331.

⁵ *Univ. of Des Moines v. Polk County Homestead & Trust Co.*, 87 Ia. 36.

⁶ See Ames, *Mutuality in Specific Performance*, 3 Columbia L. Rev. 1, and cases cited.

⁷ *Northern Central Railway v. Walworth*, 193 Pa. St. 207; *Lamprey v. St. Paul & Chicago Railway*, 89 Minn. 187.

⁸ *Blanton v. Ky. Distilleries Co.*, 120 Fed. Rep. 318.

answer that he was once remediless. Equity distinguishes between unfair, one-sided bargains, and fair, two-sided bargains which, because of wise policy of law, one party may elect to repudiate. Equity refuses to aid the former, but she would be untrue to herself if she made a preliminary disability in the latter, removable by election to proceed, pretext for staying her hand. Although all this is now generally well settled, confusion still arises from failure to distinguish from true lack of mutuality defenses grounded on the unfair consequences of specific performance. In granting the plaintiff the largest measure of equitable relief courts must look at the situation which a decree will create. It must not be such as to prejudice the defendant's chances of obtaining his equivalent. A ball-player must not be enjoined from playing on another team if, upon his later repentance and his manager's refusal again to employ him, he may find the decree has lost him his market. That the plaintiff in such cases takes nothing by his bill is due, not to the like-for-like doctrine of the old law, but to the unfair consequences to the defendant's position that might flow from the decree.

Some contracts, however, from their nature admit on one side of adequate remedy at law or in equity, but not on the other, as in the case of an agreement to supply a peculiar chemical compound.⁹ Nothing short of voluntary performance can cure the inherent infirmity of one party's position. But here it is argued that if specific performance to the plaintiff work no prejudice to the defendant's position, involve neither payment of consideration without security for the equivalent nor forfeiture of market, the defendant's plight must not restrain the chancellor. The bargain is of his own seeking. The decree will not add to his sorrows. Performance, though specifically decreed to the plaintiff, will be *pari passu*. Self-help will bar forfeiture, for if ever the plaintiff cease to perform, the defendant will be instantly discharged from operation of the decree. It is submitted that this is the true case of lack of mutuality of remedy. The machinery of equity is here working a real preference by giving the plaintiff the whip-hand. At pleasure he can drive on the bargain or elect to halt. The defendant's initiative is paralyzed. He must take his cue from the caprice of the plaintiff and damages at law cannot satisfy.¹⁰ It would seem that along with the non-weakening of the defendant's position there should also exist some compelling policy of public welfare to incline equity to increase this inequality between the parties by granting specific performance to the plaintiff.

"DUE PROCESS OF LAW" IN STATUTORY REMEDIES AGAINST UNINCORPORATED ASSOCIATIONS. — The inconvenience under modern business conditions of the common law doctrine that an unincorporated association, being merely a large partnership, can sue and be sued only in the names of all its individual members has led to much legislation altering more or less the common law procedure.¹ Some statutes provide for suits against associations (or partnerships) in the associate names, service of process on the officers or other associates, and judgments binding the associate property,

⁹ *Hills v. Croll*, 2 Phill. 60.

¹⁰ On this ground are most vulnerable such cases as *Lumley v. Wagner*, 1 De G. M. & G. 604, allowing specific performance of negative provisions collateral to affirmative contracts themselves unenforceable in equity.

¹ See Dicey, *Parties*, 148, 266.

but only those members individually who have been personally served.² These enactments seem unquestionably valid.³ A few states, however, have statutes similar, but providing for judgments binding individually even those members not personally served.⁴ Such a statute in Vermont was recently held not violative of the fourteenth amendment to the federal Constitution as involving the taking of property without due process of law. *Patch Mfg. Co. v. Capeless*, 63 Atl. Rep. 938.

In reaching this decision, the court lays stress, first, upon the analogy of the valid statutory liability of individual stockholders in corporations for corporate debts; and, secondly, upon the argument that the members of the association, in becoming such, impliedly contracted with reference to the statute and are bound by its provisions. The reasoning seems of doubtful validity. The statutory liability of stockholders in corporations is really assumed by them as one of the conditions upon which they will be created a corporate body at the will of the state.⁵ But the statutory liability of members of unincorporated associations is plainly not a voluntary sacrifice to gain a legislative gift of associate powers.⁶ The latter is the result of the exercise of general legislative powers; while the former always arises from the express provisions of a particular charter, or from provisions impliedly interpolated in all charters.⁷ Furthermore, while the date of the formation of the association in question does not appear, yet the statute plainly applies as well to associations already formed as to future ones.⁸ How, then, could the members of those associations formed prior to the enactment, "in becoming such, impliedly contract with reference to" statutory provisions perhaps not yet dreamed of?

Although these reasons fail to support the decision, yet, when the previous liabilities of members of unincorporated associations are considered, the enactment in question seems to involve no taking of property without due process of law. The members of such bodies when properly served with process have always been liable individually for the associate debts.⁹ Under the statute these liabilities are not at all increased. There has been merely a change in procedure, in the form of remedy. But the fourteenth amendment does not restrict "the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."¹⁰ Personal notice or service is not indispensable to "due process of law."¹¹ The question then resolves itself to this: does the service of process on the officers of an unincorporated association give the other members reasonable opportunity to defend? Since the officers are really agents of each of the members in transacting associate business, service of process on the officers as agents may well be considered reasonable notice

² Tex. Rev. Stat. 1895, § 1224; Minn. L. Rev. 1905, § 4068.

³ *Sugg v. Thornton*, 132 U. S. 524; *Gale v. Townsend*, 45 Minn. 357.

⁴ Vt. Stat. 1894, §§ 1099, 1183; S. C. Civ. Code, 1902, §§ 2229-2231.

⁵ See *Whitman v. Oxford*, etc., Bank, 176 U. S. 559; also *Mor., Private Corp.*, 2 ed., §§ 869, 870.

⁶ See *Mor., Private Corp.*, 2 ed., §§ 8, 878.

⁷ See *Barton*, etc., Bank *v. Atkins*, 72 Vt. 33; *Hampson v. Weare*, 4 Ia. 13.

⁸ Vt. L. 1882, No. 71, § 5.

⁹ See *Lawler v. Murphy*, 58 Conn. 294, 313.

¹⁰ See *Iowa*, etc., Ry. Co. *v. Iowa*, 160 U. S. 389, 393.

¹¹ See *Happy v. Mosher*, 48 N. Y. 313, 317.

to bind their principals, the other members. Besides, the members may easily provide for making the official knowledge of their officers their own. Certainly actual notice to each individual of hostile legal proceedings seems as sure here as in the common instances of service by publication and substituted service; yet the constitutionality of both these methods of serving process has often been upheld.¹² While the present decision seems the first on the exact point at issue, a similar result has been reached in the case of joint debtors;¹³ and the modern commercial instinct would surely tend towards the decision of the Vermont court.

RECOVERY AGAINST A FRAUDULENT DEFENDANT IN A SUIT BETWEEN PARTIES TO AN ILLEGAL CONTRACT. — As a general rule, parties to an illegal contract cannot maintain a suit either to enforce the contract or recover damages for its non-performance; or to recover money or property transferred to the defendant in accordance with its terms.¹ Certain exceptions to this rule, which do not depend upon the circumstances under which the illegal contract was made, but upon its very nature, concern this discussion but little and will be mentioned only for the sake of clearness. They are, roughly, cases where it is thought that public policy is best served by allowing recovery to one party who is deemed less in fault. Instances are cases of marriage brokerage,² and of statutes declaring certain contracts illegal, but imposing a penalty upon one party only.³

Turning now from cases where recovery if allowed depends upon the nature of the illegal contract, let us consider the cases where recovery is allowed in the particular suit before the court on account of the peculiar circumstances under which the illegal contract was formed, though apart from such circumstances no recovery would be allowed. Recovery may be had where the defendant occupied such a position that the plaintiff was accustomed to, and did, rely upon the defendant's judgment rather than upon his own, as in the cases of guardian and ward,⁴ and attorney and client.⁵ But even if there be such a relation, if the plaintiff acted upon his own judgment, he cannot recover.⁶ The question now arises whether we shall allow recovery where, without there being any such relation, the defendant has been guilty of fraud in inducing the plaintiff to enter into the contract or of fraud in the performance of it, though the plaintiff had full knowledge of the illegality. It will be seen that this is not a case analogous to the preceding established exception, for that must be based upon a theory of the plaintiff's lack of responsibility for the illegal contract, while in this case there can be no question on that score. The sole question raised here is whether or not the defendant's additional guilt can give basis for recovery by the plaintiff. But in no case, whether defendant was fraudulent or not, was there any question as to his liability, the fatal objection being as to the plain-

¹² *Mason v. Messenger*, 17 Ia. 261; *Continental, etc., Bank v. Thurber*, 74 Hun 632; aff. 143 N. Y. 648.

¹³ *Harker v. Brink*, 24 N. J. Law 333.

¹ *Stewart v. Thayer*, 170 Mass. 560.

² *Duval v. Wellman*, 124 N. Y. 156.

³ *Smart v. White*, 73 Me. 332; *Tracy v. Talmage*, 14 N. Y. 162.

⁴ *Hatch v. Hatch*, 9 Ves. 292; cf. *Boyd v. De la Montagnie*, 73 N. Y. 498.

⁵ *Ford v. Harrington*, 16 N. Y. 285.

⁶ *Roman v. Mali*, 42 Md. 513.

tiff's inability to recover, in view of his own misconduct. And the plaintiff's misconduct is equally grave in the presence or absence of fraud in the defendant.⁷

In a recent case, however, the Supreme Court of Missouri held that the plaintiff could recover under such circumstances on the ground of public policy. *Hobbs v. Boatright*, 93 S. W. Rep. 934.⁸ This is in accord with a considerable body, possibly the majority, of decisions,⁹ the cases being nearly evenly divided. In this case the recovery was in tort, for fraud and deceit. But as the cause of action arises only through the existence of, and the plaintiff's participation in, the illegal contract, it seems that the plaintiff should on principle be barred in tort as well as in contract or quasi-contract. The cases, too, make no distinction in result between the two forms of action. The argument of the court, that on public policy recovery by the plaintiff is desirable, in spite of the plaintiff's wrongdoing, on account of the unusual guilt of the defendants, seems to be open to objection. It would seem better for the court to refuse to interfere in illegal contracts, once entered into by a plaintiff fully responsible for his wrongdoing, than to protect such a plaintiff and thus to encourage the belief that people may enter into illegal contracts and transactions secure in the knowledge that the law will protect them from all fraud. It is not the office of the law to guarantee to the gambler a square deal. The illegal contract should be outlawed in its entirety, and no rights allowed to issue from it in any way, in order to discourage all from entering upon it. The courts are naturally anxious to punish the unscrupulous defendant in these cases, but that should be left to the criminal law.

CONSTRUCTION OF STATUTES AFFECTING THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-CRIMINATION. — This question of statutory construction has been raised by a group of recent important decisions. *United States v. Armour & Co.*, 142 Fed. Rep. 808 (Dist. Ct., N. D. Ill.) ; *State v. Murphy*, 107 N. W. Rep. 470 (Wis.) ; *Rudolph v. State*, 107 N. W. Rep. 466 (Wis.). The statute involved in the federal case was the Act of Feb. 11, 1893,¹ providing that "no person shall be excused from testifying . . . before the Interstate Commerce Commission . . . on the ground that the testimony . . . may tend to incriminate him. . . . But no person shall be prosecuted . . . on account of any transaction, matter or thing concerning which he may testify . . . before said Commission"; and in the other cases a state duplicate of that statute was under consideration.² The federal statute was enacted by Congress in deference to a decision of the Supreme Court in *Counselman v. Hitchcock*³ holding a prior immunity statute (providing merely that evidence exacted from a witness should not be used against him) unconstitutional, as infringing the fifth amendment to the Constitution, since it did not protect the witness from the indirect use of his testimony against him.

⁷ *Abbe v. Marr*, 14 Cal. 210; *Kitchen v. Greenabaum*, 61 Mo. 110.

⁸ In this case the plaintiff was himself fraudulent, yet recovered on the ground of defendant's fraud. See statement of facts, p. 72.

⁹ *Catts v. Phalen*, 43 U. S. 376; *Webb v. Fulchire*, 3 Ired. (N. C.) 485. *Contra*, *Abbe v. Marr*, *supra*; *Kitchen v. Greenabaum*, *supra*.

¹ 27 Stat. at L. 443, c. 83.

² Wis. L. 1901, p. 106, c. 85.

³ 142 U. S. 547.

There are dicta in numerous cases to the effect that under this statute the act of testifying wipes out the offense completely as far as concerns the witness,⁴ affording an immunity even broader than that provided by the Constitution, which merely provides against incriminating testimony given under compulsion; but never before, apparently, has the question been directly involved in a decision. In the federal case under consideration Judge Humphrey repeats the sweeping dicta of previous cases, contending for the immunity even where the witness was under no compulsion⁵ and when his testimony was not self-criminatory, and refuses to sustain the prosecution. In the two Wisconsin cases the prosecution is supported on the ground that the immunity statute was intended to be only an equivalent for the fifth amendment, and therefore should be confined to cases of incriminating evidence obtained by compulsion.

Judge Humphrey's conclusions are the result of a literal application of the language of the statute, together with an assumption that the primary object of Congress in its enactment was to obtain information as a basis for regulative legislation rather than for purposes of prosecution. However this last may be, a consideration of the line of statutes culminating in that of 1893 indicates that the primary object of Congress was simply to provide an immunity sufficient to satisfy the constitutional requirements as laid down by the supreme court in *Counselman v. Hitchcock*. Now, although this case does contain statements to the effect that, in order to be constitutional, an immunity clause must protect the witness from any subsequent prosecution, these statements seem to have been made in contemplation of a witness offering self-criminating testimony under compulsion. Moreover, in the statute itself, though the words actually granting the immunity from prosecution are without qualification, they immediately follow the provision that the witness shall not be *excused* from testifying (thus implying compulsion), on the ground that such testimony may tend to *criminate* him. There is warrant, therefore, for the contention, in one of the Wisconsin cases, that the clause granting immunity should be read as qualified by the conditions of compulsion and self-crimination.⁶ Finally, if the replies of the witness not only lack all self-criminatory character, but are in addition merely negative in effect, there is authority for the contention that they do not form testimony at all, thus not falling within the literal statutory requirements;⁷ and in any event the result of granting immunity in such cases would be so clearly contrary to the spirit of the enactment as to justify a different construction.⁸

CONSPIRACY TO COMMIT A CRIME REQUIRING PLURALITY OF ACTORS. — When the concurrence of two persons is necessary for the commission of a crime, — bigamy or adultery, for example, — the agreement to commit the crime is said to form part of the crime itself and not an independent conspiracy.¹ In such a case combination, which is the gist of conspiracy, is

⁴ See *Brown v. Walker*, 161 U. S. 591.

⁵ See *People v. Sharp*, 107 N. Y. 427, *accord*.

⁶ *Cf. United States v. Price*, 96 Fed. Rep. 960.

⁷ *Re Edwards*, 58 Ia. 431.

⁸ *Church of the Holy Trinity v. United States*, 143 U. S. 457.

¹ *Shannon v. Commonwealth*, 14 Pa. St. 226; *Miles v. State*, 58 Ala. 390; see 2 Whart., *Crim. L.*, 10 ed., § 1339.

not in aggravation of the offense, but essential to it; and doubtless, therefore, such an agreement, plus an act in furtherance of the crime, would constitute a mere attempt.² The most recent application of this principle was to the giving and taking of a rebate. *United States v. Guiford et als.*, 38 Chi. Leg. N. 411 (Dist. Ct., S. D. N. Y.). In this case an indictment was brought under a federal statute³ which provided that if two or more persons conspired to commit an offense against the United States, and if one or more of the parties did any act to effect the object of the conspiracy, all of the parties should be liable to fine, imprisonment, or both. The defendants had not only agreed to give and take rebates, but had actually given and taken rebates, an offense against the United States punishable only by fine at the time the defendants committed it.⁴

The agreement between the giver and the taker of a rebate, since concert of action between these two is indispensable to the commission of the offense of rebating, may be admitted not to constitute an independent conspiracy; but from this the conclusion does not follow that an agreement between three takers and two givers, as in this case, is not a conspiracy; and still less does this follow when to these five persons are added two more, who were go betweens and agents both for the receivers of the rebates and for certain outsiders who shared in the benefits of the transaction. To hold, as the court does, that the agreement between these seven men was not a conspiracy, seems an extreme application of the principle which has been adduced from the idea of plurality of actors. The understanding between one giver and another, between one receiver and another, and between all of these and the two agents, is not that sort of agreement which simply makes possible the act of giving and taking, but is a complete, independent, and formidable conspiracy. The court relies somewhat on the fact that only the givers and the receivers of the rebate were indicted; but the prosecution is not bound to indict all the conspirators, nor any particular conspirator.⁵ The court objects also that under this indictment the defendants are liable to imprisonment, whereas Congress has provided for the imposition of only a fine for the actual giving and taking of rebates. But the prosecution was for the distinct offense of conspiracy, not for the crime which was the object of the conspiracy; and, under the same statute, certain conspirators who failed to accomplish the purpose of their combination have been held liable to punishment more severe than could have been inflicted had they committed the contemplated crime and been indicted therefor.⁶ The defendants in the principal case ought not to be better off because they have accomplished their object. Further, no question of merger can arise here, because, whatever may be said for the doctrine of merger where the conspiracy is a misdemeanor and the object thereof is a felony, that doctrine has no application to this case where both are misdemeanors.⁷ Nor does it seem that the language of the Elkins' Act⁴ — which made it unlawful for any person or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate — will warrant a construction that prevents the agreement of the seven persons involved in this case from being indicted and punished as a conspiracy.⁸

² Cf. 2 Bish., Crim. L., 8 ed., § 184, n. 4.

³ U. S. Rev. Stat., § 5440; 1 U. S. Rev. Stat. Supp. 264.

⁴ 32 U. S. Stat. at L. 847, Elkins' Act.

⁵ *Heine v. Commonwealth*, 91 Pa. St. 145.

⁶ *Clune v. United States*, 159 U. S. 590.

⁷ *Berkowitz v. United States*, 93 Fed. Rep. 452.

⁸ *United States v. Thomas et al.*, 145 Fed. Rep. 74.

INFANT ENJOINED FROM BREACH OF CONTRACT. — It has long been the general rule that an infant's contracts are voidable at his election.¹ The courts give him this privilege to protect him from the improvidence and lack of judgment usually ascribed to youth. Where the contract is entirely executory the rule is easy of application, for the adult loses nothing but his contract right. But where the contract is wholly executed we face a new situation. There are in this class of cases two considerations: first, the policy of the law to protect the inexperience of the infant; and, secondly, to make him conform to the principles of common honesty.² Hence it is everywhere agreed that if the infant still has the consideration in specie, he must return it in order to disaffirm.³ Where, however, the infant has disposed of or spent the consideration, the authorities are not in accord. The view of the decided majority is that the infant still retains his right to disaffirm without being responsible for the dissipated consideration.⁴ The rule is the same in equity as at law,⁵ and the trend of modern authority is toward the majority view.⁶ It is submitted that this view is the better, for otherwise we should make the very improvidence from which we seek to protect the infant the reason for holding him to his contract.

If the contract, however, is executed only on the part of the adult, it may well be doubted if, even in the jurisdictions where the minority rule is held, the infant would be compelled to complete his contract though he has disposed of the consideration. Their rule has always been applied to wholly executed contracts where the infant, as the active party, seeks the return of his consideration, and they have made him do justice when seeking to avail himself of his right to disaffirm and recover. But the doctrine of an infant's right to refuse to carry out his contracts is too fundamental and well established in the law for it to be maintained that in case he has spent the consideration he must complete his executory contract.⁶

What has been said with regard to the cases where the infant has disposed of the consideration is equally applicable to the cases where he retains it, but it is of such a character that he cannot return it. No real difference can be seen between them.⁷ Therefore it seems logically indefensible for a court to enjoin an infant from soliciting the trade of his late employer's customers where by the contract of service he had expressly agreed not to do so during a certain period after the cessation of employment. Yet a recent New York case, decided by the Appellate Division of the Supreme Court, following the English authorities,⁸ has held to the contrary. *Mutual Milk and Cream Co. v. Prigge*, 112 App. Div. 652. The decision cannot even be supported on the ground that the infant could have been enjoined independently of contract, for it is well settled that a servant may, in the absence of a contract to the contrary, set up in the line of business of his late employer and solicit the trade of the latter's customers, whose good will he has secured *bona fide* in the course of and during his service.⁹

¹ *Gaffney v. Hayden*, 110 Mass. 137.

² See *Johnson v. Ins. Co.*, 56 Minn. 365.

³ *Dickerson v. Gordon*, 5 N. Y. Supp. 310.

⁴ *Price v. Furman*, 27 Vt. 268; *New York Building Loan Banking Co. v. Fisher*, 23 N. Y. App. Div. 363. *Contra*, *Johnson v. Life Ins. Co.*, *supra*; *Valentini v. Canali*, L. R. 24 Q. B. 166.

⁵ *Eureka Co. v. Edwards*, 71 Ala. 248.

⁶ *Walsh v. Young*, 110 Mass. 396; *cf.* *Breed v. Judd*, 1 Gray (Mass.) 455.

⁷ *Allen v. Lardner*, 78 Hun (N. Y.) 603.

⁸ *Evans v. Ware*, [1892] 3 Ch. 502; see also *De Francesco v. Barnum*, 43 Ch. D. 165.

⁹ *Irish v. Irish*, 40 Ch. D. 49; see also *Robb v. Green*, [1895] 2 Q. B. 1, 13.

RECENT CASES.

AGENCY — UNDISCLOSED PRINCIPAL'S RIGHTS AND LIABILITIES WITH RESPECT TO THIRD PERSONS — UNDISCLOSED PRINCIPAL SURETY ON AGENT'S NOTE. — The defendant through her agent sought to borrow money from the plaintiff. The latter lent the money, but only after securing the signature of the defendant as surety on the note given as collateral by the agent. The plaintiff acted in ignorance of the fact that the loan was secured for the defendant. The note was not protested at maturity, and the plaintiff sought to recover against the defendant as undisclosed principal. *Held*, that the plaintiff cannot recover. Two judges dissented. *Brown v. Lanpher*, 35 N. Y. L. J. 1651 (N. Y., Sup. Ct., App. Div., July, 1906).

Though the defendant was not liable on the note, it seems that he should have been held in *assumpsit*, which was the nature of the count in this case. *Pentz v. Stanton*, 10 Wend. (N. Y.) 271. The court based its decision to the contrary on the ground that the defendant "was not an undisclosed principal," but "an open, declared, and active participant in the transaction." This seems to be a misconception of the true principle underlying the rule as to the liability of an undisclosed principal, which, it is conceived, is that the third party has in all cases a right to choose whether or not he shall hold the principal liable. This choice is ordinarily made at the time of entering into the contract, but as it is clear that there cannot be any election as to holding the principal when he is undisclosed, the rule results that in such case the third party may make his election at any time subsequent to the discovery of the principal. *Thomson v. Davenport*, 9 B. & C. 78. The fact that in this case the principal took part in the transaction as surety should have no effect to destroy his liability as having been an undisclosed principal, for since the fact of the agency was unknown to the third party, he could have made no choice not to hold the principal. See *Railton v. Hodgson*, 4 Taunt. 576 n. (a).

BANKRUPTCY — EXEMPTIONS — LIFE-INSURANCE POLICY. — The National Bankruptcy Act allows a bankrupt who holds an insurance policy which has "a cash surrender value" to pay such value to the trustee in bankruptcy and hold the policy henceforth free from creditors. NAT. BANKR. ACT, § 70 a (5). A bankrupt held three tontine policies which did not expressly give the holder a right to a cash surrender value, but it was the invariable custom of the insurance company to allow such an option on policies of that kind. *Held*, reversing the Circuit Court, that the bankrupt might retain the policy. *In re Mertens*, 142 Fed. Rep. 445 (C. C. A., Second Circ.).

For a discussion of the principles see 19 HARV. L. REV. 377, suggesting this rule and criticising cases *contra*.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — TRUSTEE IN BANKRUPTCY NOT EQUIVALENT TO JUDGMENT CREDITOR. — The appellant sold machinery to a corporation of which the respondent was trustee in bankruptcy on a conditional sale contract without filing the contract as required by a statute of Ohio to make it good against creditors. The machinery was installed in the corporation's factory. *Held*, that, adopting the Ohio court's interpretation that an unfilled contract of conditional sale is void as to only those creditors who have fastened upon the property by some specific lien, this conditional sale is valid as against the trustee. *York Manufacturing Co. v. Cassell*, 201 U. S. 344.

This decision, the first on this exact point since the passage of the Bankruptcy Act of 1898, is based chiefly on the grounds that the trustee in bankruptcy stands merely in the bankrupt's shoes. Apparently no notice was taken of § 67a, providing that "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." U. S. COMP. STAT. 1901, p. 3449. The decision of the lower court, hereby reversed, and another Circuit Court of Appeals case present what is perhaps a better view. *York Manufacturing Co. v. Cassell*, 135 Fed.

Rep. 52; *In re Pekin Plow Co.*, 112 Fed. Rep. 308; see *In re Thorp*, 130 Fed. Rep. 371. The institution of proceedings in bankruptcy amounts to an effectual sequestration for the benefit of creditors of all the property of the bankrupt which might have been seized by the creditors. Therefore, when such proceedings have been instituted, there would seem to be the effectual seizure required by the interpretation of the Ohio statute. For further discussion of the general question, see 16 HARV. L. REV. 370.

BANKRUPTCY — PROVABLE CLAIMS — ANTICIPATORY BREACH OF CONTRACT. — The petitioner, who had made a contract to deliver supplies over five years following, claimed that the other party's adjudication in bankruptcy by involuntary proceedings constituted a breach of the contract, and wished to be allowed to prove his damages against the estate. The trustees in bankruptcy had elected not to carry out the contract. *Held*, that adjudication in bankruptcy is not equivalent to a refusal of the bankrupt to perform or to permanent disability to perform, and that therefore no debt exists provable against the estate. *In re Imperial Brewing Co.*, 143 Fed. Rep. 579 (Dist. Ct., W. D. Mo.).

By the Bankruptcy Act of 1898 the provability of a claim depends upon its status at the time the petition is filed. U. S. COMP. STAT. 1901, p. 3447. When insolvency occurs, the assignee or trustee in bankruptcy has a right to fulfill any of the contracts of the bankrupt. *Cf. Brassel v. Troxel*, 68 Ill. App. 131. But in this case the trustee had not elected to fulfill the contract. By the ordinary doctrine of anticipatory breach, if the vendee refuses to perform, or disables himself from performing the contract, a breach is thereby committed, and he is immediately liable for damages on the whole contract. *Rockm v. Horst*, 178 U. S. 1. When the creditor elects to treat bankruptcy as a breach, as he has done in the present case by offering to prove his claim, and the trustee does not exercise his election to go on, the adjudication should be equivalent to repudiation or self-disablement, and the debt, thereupon a present liability, should be provable against the bankrupt estate. *In re Pettingill*, 137 Fed. Rep. 143. The court seems unwisely to limit the logical extension of the theory of anticipatory breach.

CARRIERS — LIMITATION OF LIABILITY — LIABILITY TO ADMINISTRATOR OF ONE WHO HAS WAIVED HIS RIGHTS AGAINST CARRIER. — In consideration of reduced charges, the deceased agreed that the railroad should not be liable for any damage to him or his goods due to its negligence. The New York Code allows the administrator an action for death when the deceased could have recovered for the injury had it not proved fatal. *Held*, that, under this statute, the administrator may recover from the carrier for the death caused by its negligence. *Hodge v. Rutland Rd. Co.*, 112 N. Y. App. Div. 142.

By this decision New York adopts the prevailing rule. See 13 HARV. L. REV. 309; 17 *ibid.* 491.

CARRIERS — NEGLIGENT DELAY — ACT OF GOD. — A connecting carrier, in spite of continued explicit warnings from the U. S. Weather Bureau, negligently detained goods at a station until they were overtaken by a flood. *Held*, that the original carrier is liable. *Wabash R. Co. v. Sharpe*, 107 N. W. Rep. 758 (Neb.).

There is some conflict of authority as to whether or not unnecessary delay on the part of a carrier, without other negligence, consequent upon which is the destruction of goods in transit by act of God, renders the carrier liable. The better view would seem to be that mere nonfeasance is in such cases too remote a condition to be regarded as part of the legal cause of the damage. *Morrison v. Davis*, 20 Pa. St. 171, approved in *Denny v. N. Y. C. R. Co.*, 13 Gray (Mass.) 481; *contra*, *Read v. Spaulding*, 30 N. Y. 630. But the decision in the principal case is clearly correct, since the negligent delay was here not a mere antecedent condition of the loss, but a present co-operating cause, continuing up to the time of the disaster. Moreover, a flood against which, by reason of previous warning, provision could have been made in ample time would not seem to fall within any proper definition of an act of God. See further, 10 HARV. L. REV. 310.

CARRIERS — PERSONAL INJURIES TO PASSENGERS — UNSAFE APPROACHES TO STATIONS. — The plaintiff received personal injuries through the openly defective condition of a stairway indicated and constantly used as an approach to the defendant's station. This stairway, the majority of the court assumed, was owned and maintained by the city. There were other suitable approaches to the station. *Held*, that the defendant is liable. *Schlessinger v. Manhattan Ry. Co.*, 98 N. Y. Supp. 840.

It is the duty of a railroad company to use proper care that safe means of access to and from its stations be provided for the use of passengers. Undoubtedly, therefore, the company is liable for personal injuries resulting from defective passageways negligently maintained by it on its own premises. Furthermore the same liability has been imposed for defective approaches, apparently open to use by passengers, both when they are on the railroad's premises but maintained by other parties, and when they are on another's premises but maintained by the railroad. *Del., etc., R. R. Co. v. Trautwein*, 52 N. J. Law 169; *Tobin v. Portland, etc., R. R. Co.*, 59 Me. 183. The present decision with two somewhat similar adjudications tends to show that the carrier would generally be held liable, although the defective approach was owned and maintained by another and on another's premises. See *Cotant v. Boone, etc., Ry. Co.*, 125 Ia. 46; *Gulf, etc., Ry. Co. v. Glenk*, 9 Tex. Civ. App. 599, 606. Here, however, the liability cannot well be for the defective condition of the approach itself, for the railroad company had no legal right to make repairs on another's property. The railroad's wrong really lay in not guarding its own premises so that passengers would not reasonably be led to use the dangerous passages therefrom. *Cf. Burgess v. Great Western Ry. Co.*, 6 C. B. (N. S.) 923.

CHARITIES AND TRUSTS FOR CHARITABLE USES — WHAT CONSTITUTE CHARITIES. — **TRUST FOR PATRIOTIC PURPOSES.** — A testatrix by her will left certain funds to be invested by specified trustees, and directed that a part of the income be given annually to the ringers for the time being of the parish church, who should ring a peal of bells on every May 29 in commemoration of the happy restoration of the monarchy to England. *Held*, that the provision is a valid charitable gift. *In re Pardoe-McLaughlin v. Atty.-General*, 22 T. L. R. 452 (Eng., Ch. D., Apr. 10, 1906).

Under the broad definition given to the term "charitable trusts" by the courts at the present day, the present case is undoubtedly correct. *Webb v. Oldfield*, [1898] 1 Ir. Ch. 431. The term covers not only such objects as would be understood by it in its popular sense, but also anything which tends to benefit a number of people by bringing their minds or hearts under the influence of education and religion, lessening public burdens, or by conducing to their social betterment. *Garrison v. Little*, 75 Ill. App. 402. Accordingly, gifts in trust for anti-vivisection societies, temperance societies, vegetarian societies, societies for studying and curing diseases of animals useful to man, and the like, as well as gifts for strictly educational or religious purposes, have been upheld as charitable trusts. *In re Foveaux*, [1895] 2 Ch. 501; *Harrington v. Pier*, 105 Wis. 485; *Webb v. Oldfield, supra*; *University of London v. Yarrow*, 1 De G. & J. 72. A patriotic trust, as in the principal case, can be supported either as educational, for it instructs and reminds the people of their history, or as one for social betterment, since it brings the people to a greater realization of their duty to their country and their neighbor. In either aspect, it is a valid charitable trust. *Sargent v. Cornish*, 54 N. H. 18.

CONFLICT OF LAWS — EFFECT OF CONTRACTS — DAMAGES RECOVERABLE FOR BREACH IN DIFFERENT STATE. — A telegraph message sent in Indiana to the plaintiff in Kentucky was delayed in Indiana, with the result that the plaintiff suffered mentally through the delay in delivery. He sued in Kentucky, and obtained judgment. The defendant appealed. *Held*, that the defendant's liability is governed by the law of Kentucky. *Western Union Telegraph Co. v. Lacer*, 93 S. W. Rep. 34 (Ky.).

For a case allowing recovery in the state in which the message was sent, and for a discussion of the principles involved, see 17 HARV. L. REV. 354.

CONFLICT OF LAWS — TESTAMENTARY SUCCESSION — EFFECT OF WILLS ACT ON WILL OF ENGLISHWOMAN MARRYING SCOTCHMAN. — The English Wills Act of 1837 provides that "every will made by a man or woman shall be revoked by his or her marriage." This act does not apply to Scotland. An Englishwoman after having made her will married a domiciled Scotchman. After they had lived in Scotland some time, she died. *Held*, that the will is not revoked, since by her marriage the testatrix became Scotch, so that the Wills Act did not apply to her. *Westerman v. Schwab*, 43 Sc. L. Rep. 161.

The exact point raised by this case has apparently never before been adjudicated. The principal argument in favor of revocation seems to have been that the English Wills Act has the effect of reading into every person's will a clause that the will should be revoked before marriage. It has been held, however, that if a Frenchwoman marries a domiciled Englishman, her will, on which the English act would have no effect when made, is revoked by marriage. See *In re Martin*, [1900] P. 211. This would seem to show that the act operates not because of any tacit condition annexed to the will, but directly at the time of the marriage. Following this interpretation of the act, the court decided the case on the general principle that the civil effect of the marriage should be determined by the law of the matrimonial domicile, which is usually the domicile of the husband. See *Mason v. Homer*, 105 Mass. 116. It is well settled that the distribution of personal effects as between wife and husband, when of different jurisdictions, falls within this rule. *Mason v. Fuller*, 36 Conn. 160. The adoption of this principle offers a further means of harmonizing the principal case with the case cited above, where the effect of the marriage was to revoke the instrument. See *In re Martin*, *supra*.

CONSPIRACY — CRIMINAL LIABILITY — CONSPIRACY TO COMMIT CRIME REQUIRING PLURALITY OF ACTORS. — An indictment charged that the four defendants — of whom two were members of a Detroit company and two traffic managers of a railroad doing an interstate business, — a member of the Detroit company, since deceased, and others to the jurors unknown, had conspired with one another and with two persons who acted as agents both for the Detroit company and for two New York corporations, to procure the railroad to give rebates on sugar shipped by the New York corporations to the Detroit company; and alleged overt acts, culminating in the giving of rebates by the traffic managers to the two agents for the benefit of the Detroit company and the New York corporations. *Held*, that there is no conspiracy. *United States v. Guilford et als.*, 38 Chi. Leg. N. 411 (Dist. Ct., S. D. N. Y., July, 1906). See NOTES, p. 62.

CONSPIRACY — CRIMINAL LIABILITY — DAMAGE TO PERSON IN HIS TRADE OR CALLING. — In accordance with an agreement of theatre managers to exclude the complainant, a dramatic critic, from their play-houses, he was refused admission to certain performances and forcibly prevented from entering. *Held*, that, under the Penal Code of New York, such agreement is not criminal unless the sole motive is to inflict harm. *People v. Flynn*, 100 N. Y. Supp. 31.

The class of criminal conspiracies where there is contemplated, in the means or the end, no act which would be tortious or criminal if done by an individual, is hard to define. Many such conspiracies derive their criminality from the danger to the individual of the combined exercise of an imperfect right which would be comparatively harmless and therefore negligible by the law when exercised by a single person. *Smith v. People*, 25 Ill. 17; *Mifflin v. Com.*, 5 Watts & S. (Pa.) 461. Even where the agreement is to do a thing perfectly lawful for the individual, the combination may have such power for oppression as to be criminal. *State v. Donaldson*, 32 N. J. Law 151; *Com. v. Carlisle*, Bright. (Pa.) 36. Whether such agreements are criminal seems to depend on whether their purpose is justifiable. Combinations which work ruin to individuals in fair competition are clearly lawful, and so are peaceful strikes by workmen to secure an advance in their own wages. *Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. 598; see *Master Stevedores' Assn. v. Walsh*, 2 Daly (N. Y.) 1. But conspiracies to inflict wanton harm on an individual in his

trade or calling, whatever the means used, are criminal. *King v. Eccles*, 1 Leach 274. The principal case can be supported, if at all, on the ground that the parties to the agreement were only taking necessary and reasonable steps to protect their business interests, and were therefore justified.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — LEGISLATIVE REGULATION OF GAS RATES. — In a suit by a gas company to recover the price of gas furnished the city of New York the city set up the defense that the price was unreasonable, although less than the maximum rate fixed by the legislature. *Held*, that the statutory fixing of a maximum rate is equivalent to express legislative authority to charge up to that rate; and that no constitutional right of the consumer is thereby impaired, even though the legislative rate is unreasonably high. *Brooklyn Union Gas Co. v. The City of New York*, 35 N. Y. L. J. 553 (N. Y., Sup. Ct.), 2 Dept., May 14, 1906.

It has repeatedly been held that governmental regulation of the charges of public service corporations must not go so far as to force them to operate at no profit, since this would be in substance confiscation of their property without due process of law. *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307; *C. M. and St. P. R. Co. v. Minnesota*, 134 U. S. 418. But the principal case is clearly right in holding that legislative authorization of unreasonably high rates does not work a corresponding confiscation of the consumer's property. True, the consumer has the common law right to be charged only a reasonable price for the services or commodities of a corporation affected with a public interest. *Aldnutt v. Inglis*, 12 East 527. But he has no property, no vested interest, in this or any other rule of the common law. *Munn v. Illinois*, 94 U. S. 113. If his expectation that in future he will secure such commodities at reasonable rates is destroyed by legislative alteration of the common law, he has suffered no loss of property without due process of law. He may refuse to buy, or he may petition the legislature to change the law. He has no remedy in the courts.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — STATUTORY REMEDIES AGAINST UNINCORPORATED ASSOCIATIONS. — A statute allowing suits against unincorporated associations in the associate names, with process served merely upon certain of their officers, provided for judgments against the associations which should be binding upon all the members so that they might be held liable individually upon final process. *Held*, that the statute is not in violation of the fourteenth amendment to the Constitution of the United States as involving a taking of property without due process of law. *Patch Mfg. Co. v. Capeless*, 63 Atl. Rep. 938 (Vt.). See NOTES, p. 58.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — FREEDOM OF CONTRACT. — *Held*, that § 171 a of the New York Penal Code making it a misdemeanor for an employer to require of an employee, as a condition of employment, that he shall not join a labor union, is unconstitutional. *People v. Marcus*, 35 N. Y. L. J. 839 (N. Y., Ct. App., May 25, 1906).

For a discussion of the principles involved, see 19 HARV. L. REV. 368.

CONSTRUCTIVE TRUST — MISCONDUCT BY NON-FIDUCIARIES — BANK RECEIVING TAX RECEIPTS ILLEGALLY DEPOSITED. — A county treasurer without legal authority deposited tax receipts in a private bank for collection, the bank knowing the treasurer's lack of authority. The bank became insolvent. *Held*, that the county has a preferred claim for the amount collected. *Page County v. Rose*, 106 N. W. Rep. 744 (Ia.).

The ordinary relation arising on the deposit of money in a bank is that of debtor and creditor. *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252. It is well settled, however, that if a bank receives a deposit knowing of its insolvency it holds the money as trustee. *Wasson v. Hawkins*, 59 Fed. Rep. 233. The same rule should hold if a bank receives a deposit knowing that it has no right to do so. *Merchants Nat. Bank v. School District*, 94 Fed. Rep. 705; *Board of Fire & Water Com. v. Wilkinson*, 119 Mich. 655. In such cases the depositor can recover his whole deposit on the bank becoming insolvent, since the law presumes that no part of the trust fund is paid out so long as an amount equal to it remains in the bank. *Sherwood v. The Central Michi-*

gan Savings Bank, 103 Mich. 109; see 19 HARV. L. REV. 520. Since the bank knew that it had no legal right to make the collections, the present decision seems correct on the ground of a constructive trust. A dictum, however, that even if the receipt were justified the bank would be a trustee seems wrong; for if the bank received the money in ignorance of the rights of third parties the relation of debtor and creditor would then arise. *Richardson v. New Orleans Debenture Redemption Co.*, 102 Fed. Rep. 780.

CORPORATIONS — STOCKHOLDERS — INDIVIDUAL LIABILITY OF TRANSFERRER OF STOCK OF INSOLVENT BANK. — A shareholder in a national bank after knowledge of its insolvency sold his stock to escape the statutory liability to assessment. More than two years later the bank failed, and the plaintiff as receiver brought suit to recover on the assessment. *Held*, that the defendant is liable only to those parties who were creditors before he transferred his stock. Three justices dissented. *McDonald v. Dewey*, U. S. Sup. Ct., May 28, 1906.

The rule limiting the liability of the transferrer to those persons who were creditors before the stock was transferred is a clear limitation of the general propositions of law made by the court in earlier cases. In those cases the statement was made that such a fraudulent transfer had no effect. *Bowden v. Johnson*, 107 U. S. 251; see *Nat. Bank v. Case*, 99 U. S. 628; *Stuart v. Hayden*, 169 U. S. 1. Although in two of the cases cited the statements were dicta, the rule of law was laid down as well established. The present decision does not purport to overthrow the *Bowden* case, but that is, in reality, its effect. The court contends that the requirement of the keeping of a correct list of shareholders is for the benefit of persons dealing with the bank, and that creditors who contract do not look to former shareholders and should not have the benefit of their liability. The minority's contention that the statute either imposes liability up to the time of the bank's failure or not at all, seems hard to answer. Even though the court's conclusion be technically sound, which is doubtful, the result reached is unfortunate.

EMINENT DOMAIN — COMPENSATION — STRUCTURE PLACED UPON LAND BEFORE CONDEMNATION. — A village before starting condemnation proceedings constructed a reservoir on the defendant's land against his express command. *Held*, that the plaintiff must pay the defendant the market value of the land, as enhanced by the construction of the reservoir. *Village of St. Johnsville v. Smith*, 184 N. Y. 341.

This decision is based upon the rule that structures erected by trespassers belong to the land-owner. *Graham v. R. R. Co.*, 36 Ind. 463. Since the plaintiff entered without any authorization, it is considered in no better position than any other trespasser. Most courts, however, hold that the plaintiff is not an ordinary trespasser, since it can acquire the land under its power of eminent domain, so that the owner is entitled to redress merely for the land and any incidental damage from the trespass. *Newgrass v. Ry. Co.*, 54 Ark. 140. It would seem that the "just compensation" required by the Constitution means this lower measure of damages, and not that the plaintiff should be penalized. See LEWIS, EMINENT DOMAIN, 2 ed., 1144-1145; *R. R. Co. v. Armstrong*, 46 Cal. 85. A distinction which has been applied when a railroad is the trespasser is that, as the company wants only an easement, it does not intend to make its structures of such permanency as to become part of the realty. *Justice v. R. R. Co.*, 87 Pa. St. 28. Of course the land-owner can always recover, sometimes in trespass, sometimes in the condemnation proceedings themselves, any incidental damage resulting from the entry. *Bethlehem Co. v. Yoder*, 112 Pa. St. 136.

EQUITY — JURISDICTION — BILL BY RECEIVER AGAINST DELINQUENT DIRECTORS OF CORPORATION. — The complainant, as receiver of a bankrupt corporation, filed bills in equity against the defendants to recover damages for alleged illegal conduct in the course of their duty as directors of the corporation. The defendants objected that the court had no jurisdiction, on the ground that the proper remedy was an action at law. *Held*, that the action is within the jurisdiction of equity. *Emerson v. Gaither*, 64 Atl. Rep. 26 (Md.).

Where the directors of a corporation have been guilty of misfeasance the corporation may file a bill in equity to compel them to account therefor. *Citizens Loan Assn. v. Lyon*, 29 N. J. Eq. 110. There may be also a concurrent remedy at law. *Thompson v. Greeley*, 107 Mo. 577. And in some code states the nature of the action may be determined by the relief demanded. *Horn Silver Mining Co. v. Ryan*, 42 Minn. 196. Some cases tend to restrict the remedy to an action at law only, unless clear and special grounds for equitable relief are shown. *Dykman v. Keeney*, 154 N. Y. 483. In general a trustee, receiver, or assignee in bankruptcy succeeds to the title of the corporation and to its rights of action. *White v. Haight*, 16 N. Y. 310. It follows, therefore, that he may assert against delinquent directors whatever rights of action the corporation could have asserted, and enforce them by the appropriate remedy. *Stephens v. Overstolz*, 43 Fed. Rep. 771. The better procedure, however, seems to be a bill in equity, because of the complicated questions which often arise, and in order to avoid multiplicity of suits. The tendency of authority is this way. *Briggs v. Spaulding*, 141 U. S. 132; *Appeal of McCarty*, 110 Pa. St. 379.

EQUITY — SPECIFIC PERFORMANCE — LACK OF MUTUALITY OF REMEDY AS DEFENSE. — In consideration of the plaintiff's agreement to furnish the defendant electric controllers for fifteen years, the defendant bound himself, with stipulation for liquidated damages, not to manufacture such controllers. The defendant did so manufacture and the plaintiff sought to enjoin him. *Semble*, that, as plaintiff cannot be decreed specifically to perform his agreement, there is not the requisite mutuality of remedy. *General Electric Co. v. Westinghouse Electric Co.*, 144 Fed. Rep. 458 (Circ. Ct., N. D. N. Y.). See NOTES, p. 57.

EVIDENCE — ADMISSIONS — OFFER TO COMPROMISE IN CRIMINAL CASE. — In a prosecution for rape the state gave evidence of an offer of money by the defendant to the foster-father of the prosecutrix to quash the proceedings. *Held*, that the evidence was wrongly admitted. *Sanders v. State*, 41 So. Rep. 466 (Ala.).

In civil actions an offer to compromise is not receivable as an admission of liability, either express or by conduct. *Tennant v. Dudley*, 144 N. Y. 504. But an unqualified statement conceding a claim of the opponent's is receivable, though it occur as part of the attempt to compromise. *Rose v. Rose*, 112 Cal. 341. The reason commonly assigned is that offers to compromise are not evidential; they imply a desire for peace, not a concession of liability. See 2 WIGMORE, EV., § 1661. But such offers may be highly evidential, — as where the offer amounts to a large part of the claim. A sounder view is that such offers are privileged by the public policy that disputes be amicably adjusted. *Perkins v. Concord Ry.*, 44 N. H. 223. Though as an original question the reason for this privilege might seem to extend to unqualified as well as to hypothetical offers, courts have confined it to the latter. *Dickinson v. Dickinson*, 9 Met. (Mass.) 471. The rule in criminal cases depends upon the theory accepted. If such offers do not evidence civil liability, neither do they evidence criminal guilt. The only square decision in point, besides the one under discussion, so holds. *Wilson v. State*, 73 Ala. 527. As matter of privilege, however, it is not public policy that criminal prosecutions be compounded, especially where the state, the real injured party, is not offeree.

EXTRADITION — INTERNATIONAL EXTRADITION — EXTRADITION FOR ONE OFFENSE AND IMPRISONMENT FOR ANOTHER. — The relator was indicted for conspiring to defraud the United States, and in another indictment for procuring the admission of goods into the United States in violation of statute. He was duly convicted and sentenced on the conspiracy charge, and having been released on bail pending an appeal fled to Canada after the affirmance of his conviction. The requisition of the United States was refused. Thereupon he was demanded for the crime charged in the second indictment and was surrendered to the United States. While in the hands of an officer he was arrested

on a warrant sworn out on the conspiracy charge, and was imprisoned. *Held*, that the relator is improperly detained. *In re Charles C. Browne*, 35 N. Y. L. J. 1695 (Circ. Ct., S. D. N. Y., Aug., 1906).

Article three of the convention of 1889 with Great Britain declares that "No person surrendered . . . shall be triable or be tried for any crime or offense committed prior to his extradition other than the offense for which he was surrendered," until he has had an opportunity to leave the country. The government contended that by virtue of the omission of the word "punished" a person extradited for a specific offense might be punished on a conviction of another offense obtained prior to his extradition. But by article seven of the same convention there is provision for the extradition of criminals whose sentence is unexecuted, and the government's contention would permit indirect action under article three when there had been failure to extradite under article seven. Before the convention of 1889 it had been decided that a surrendered person could be arrested or tried only for the offense for which he was extradited. *United States v. Rauscher*, 119 U. S. 407. As a construction favorable to the government would stultify article seven and change the previously existing law without a clear expression of such intention in the convention, the court's decision seems eminently sound.

ILLEGAL CONTRACTS — EFFECT OF ILLEGALITY — WHETHER ILLEGALITY BARS RECOVERY FOR FRAUD. — The defendants induced the plaintiff to bet upon a foot-race between two of their number by telling him that it was prearranged that a certain one should win. The other contestant won, as the defendants had all the time planned that he should. Upon discovering that the defendants constantly held such races under their auspices, the plaintiff sued to recover his losses. *Held*, that the plaintiff is not barred by his own illegal conduct. *Hobbs v. Boatright*, 93 S. W. Rep. 934 (Mo., Sup. Ct.). See NOTES, p. 60.

INFANTS — CONTRACTS — INFANT ENJOINED FROM BREACH OF CONTRACT. — The plaintiff, a milk-dealer, entered into a contract with the defendant, a minor, for the latter's service in delivering milk. The contract stipulated that the defendant, on leaving the employment, was not to solicit the trade of the plaintiff's customers during a stated period. The defendant left the employment and solicited the trade of the plaintiff's customers within the prohibited time. *Held*, that the infant should be enjoined. *Mutual Milk and Cream Co. v. Prigge*, 112 N. Y. App. Div. 652. See NOTES, p. 64.

LANDLORD AND TENANT — COVENANT IN LEASE — DAMAGES FOR PERSONAL INJURIES. — As a result of the landlord's failure to heat the apartments, as he had promised to do, the lessee's infant child caught pneumonia and died. The lessee sued to recover for the death of the child, for physician's fees, and for the services of an undertaker. *Held*, that such damages are too remote. *Dancy v. Waltz*, 112 N. Y. App. Div. 355.

The refusals to give damages for personal injuries resulting from the breach of a covenant to repair leased premises have been based on the argument that the damages were too remote. *O'Gorman v. Teets*, 20 N. Y. Misc. 359. There is some difference, however, between such a covenant and one to heat the premises, and it is certainly arguable that sickness and death may be the immediate and natural results of a breach of the latter. Moreover, landlords have been held liable when personal injuries were caused by the breach of covenants to repair such parts of premises as remained under their own general control. *Looney v. McLean*, 129 Mass. 33; *Dollard v. Roberts*, 130 N. Y. 269. There seems to be good reason for regarding the present case in the same way, considering the control exercised by the landlord over the heating plant in a modern apartment house. The court treated the covenant to heat as identical in principle with one to repair, and did not consider the apparently valid distinction noted above.

LEGACIES — ADEMPMENT — WHETHER DOCTRINE RESTS ON INTENTION WHEN INVOKED IN FAVOR OF STRANGER. — A testator left a legacy to his

adopted daughter, and made her and a third person residuary legatees. After making the will he made numerous gifts to the daughter. *Held*, that, as a matter of law, neither the bequest nor the residuary legacy to her is adeemed by the amount of such gifts. *Pomfrey v. Fryer*, 54 W. R. 625 (Eng., Ch. D., May 17, 1906).

It is well settled that whether or not a legacy is adeemed rests on the intent of the testator. *Cowles v. Cowles*, 56 Conn. 240; *Richards v. Humphreys*, 15 Pick. (Mass.) 133. The presumption is that, where a gift is made to a child by a testator in his lifetime, it is intended as a satisfaction *pro tanto* of a legacy previously given in a will, and the burden of proof is on the person seeking to show the contrary. See *Carmichael v. Lathrop*, 108 Mich. 473; 10 HARV. L. REV. 52. The present decision is supported by one other. *Meinertzen v. Walters*, L. R. 7 Ch. 670. These are apparently the only cases which lay down as a rule of law that the doctrine of ademption will not be applied where the result is to increase the gift to a residuary legatee who is a stranger. Unless the doctrine of ademption is to be repudiated altogether, it appears more in accord with principle to regard the circumstance that the gift to a stranger will be increased if the legacy is adeemed, merely as evidence of the testator's intention.

MORTGAGES — TRANSFER OF RIGHTS AND PROPERTY — SURRENDER OF LEASE GIVEN UNDER STATUTE BY MORTGAGOR. — Under an English statute giving the right, a mortgagor leased the mortgaged premises for a term of years. Before the end of the term, the lessee's executors surrendered the premises to the devisees of the mortgagor. The mortgagee sued the lessee's executors for rent. *Held*, that the mortgagee can recover, since a surrender could only be to him, the immediate reversioner. *Robbins v. Whyte*, 94 L. T. 287 (Eng., K. B. D., Nov. 29, 1905).

At common law a mortgagor cannot make a lease which will bind the mortgagee. *Rogers v. Humphreys*, 4 Ad. & E. 299. But by the English Conveyancing Act of 1881 a mortgagor in possession might make a lease binding on the mortgagee. *Wilson v. Queen's Club*, [1891] 3 Ch. 522. The mortgagee, after the making of the lease, holds a reversionary estate expectant on the term granted by the lease. *Municipal Permanent Investment Bldg. Soc. v. Smith*, 22 Q. B. D. 70. The general rule is that a surrender must be made to the holder of the immediate reversion. *Cadle v. Moody*, 30 L. J. Exch. 385. In accordance with this rule the court holds that the surrender must be made to the mortgagee in order to be valid. The fact that the statute has given the mortgagor the right to make a valid lease does not necessarily imply that the right to accept surrenders of such leases is also given. For, under the common law, a right to lease given to the mortgagor by the mortgage instrument does not give a right to accept a surrender. See *Miles v. Murphy*, 5 Ir. Law 383. The court has properly construed the statute strictly, limiting the change in the common law to the express provisions of the act.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — PRIVATE NUISANCE MAINTAINED IN HIGHWAY BY INDEPENDENT CONTRACTOR. — A sewer contractor unnecessarily and wantonly piled dirt in the street and on a vacant lot adjoining the plaintiff's premises. Surface water was thereby precipitated into the plaintiff's cellar, causing damage. The obstruction remained for eight months to the knowledge of the city and in spite of complaint. *Held*, that the city is liable for a private nuisance. *Frick v. Kansas City*, 93 S. W. Rep. 351 (Mo.).

A municipal corporation is bound to keep its streets in reasonably safe condition. The duty to repair within a reasonable time after notice of defect is a positive one and cannot be delegated. *City of Chicago v. McCarthy*, 75 Ill. 602. It follows that the municipality is liable for damage due to defective highways, though caused by the negligent or wilful conduct of an independent contractor. *Storrs v. City of Utica*, 17 N. Y. 104. The decided cases would seem to indicate that this duty is owing only to travelers on the highway, their persons and property. The present case goes a step further in extending the duty to abutters.

It finds support in one English case. *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335. There seems to be no valid reason for confining the doctrine. This duty is not one of insurance to be narrowly applied. Except where necessarily incident to public improvement, a city owes the ordinary duty not to maintain a private nuisance. *Ashley v. Port Hudson*, 35 Mich. 296; *Miller v. Mayor of N. Y.*, 109 U. S. 385. The assimilation of this duty to the former would merely prevent a municipality from shielding itself behind an independent contractor. For another ground for reaching the desirable result of the principal case, see 15 HARV. L. REV. 486.

PATENTS — INFRINGEMENT — PATENT ON IMPROVEMENT ISSUED PRIOR TO PATENT ON ORIGINAL DEVICE. — An inventor applied for a patent on device A. Pending proceedings, he applied for and obtained a patent on an improvement consisting of a combination of device A with B. Subsequently he was granted the patent first applied for. After the expiration of the patent on the combination, the defendant used this combination. Thereupon an assignee of the two patents sought to enjoin him on the ground that he was infringing the unexpired patent on A. *Held*, that upon the expiration of the patent on the combination of A and B the patentee has no further rights in that combination notwithstanding the validity of his unexpired patent upon A. *Thomson-Houston Electric Co. v. Illinois Tel. Const. Co.*, 143 Fed. Rep. 534 (Circ. Ct., N. D. Ill.).

There are two possibilities. Device A may have been an essential element of the prior patent on A B, or it may not have been. On the latter assumption the subsequent patent on A was warranted, and any user of that device before the patent thereon expired, would constitute a violation of the patentee's rights. However, A was apparently an essential element of the prior patent, since that patent is treated merely as an improvement. Therefore the subsequent grant of letters patent on A alone must have been void, since it would amount to double patenting. *Palmer Pneumatic Tire Co. v. Lozier*, 90 Fed. Rep. 732. While, therefore, the decision of the court that the use of the improved device after the expiration of the first patent was lawful, seems correct, the assumption that device A was still protected is open to question. The patentee cannot lose his exclusive rights in the improvement and at the same time retain those rights in that which forms the basis of the improvement.

PLEADING — DEMURRERS — ALLEGATION OF FOREIGN LAW. — A New York declaration to which there was a demurrer contained an erroneous allegation as to Maryland law. *Held*, that the demurrer does not admit the truth of an allegation as to the law of another state. *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54.

This decision appears unique. The exact opposite is well-established law. *Liegeois v. McCracken*, 10 Fed. Rep. 664. Foreign laws, not being within judicial cognizance, must be proved as facts on trial; but, once having been proved in evidence, no witness can conclude the court as to their proper interpretation. *Laing v. Rigny*, 160 U. S. 531; *Eastern Building & Loan Assn. v. Williamson*, 189 U. S. 122. In the principal case it is decided as a mere "corollary" of that proposition that no demurrer to an allegation of foreign law can be final. And for this is quoted, as authority, a case absolutely distinguishable. *Cf. Finney v. Guy*, 189 U. S. 335. In that case a plaintiff, having in his declaration set out sections of foreign statutes, added a further allegation as to their intent. Upon demurrer the statutes were held admitted as alleged; but being now before the court exactly like facts proved on trial, the added allegation as to their meaning was of matter come within judicial cognizance, and therefore not admitted by demurrer. In the principal case, on the contrary, the allegation of foreign law stood wholly apart from proved facts, and being therefore outside the court's judicial notice, should have been admitted by demurrer.

POLICE POWER — EXTENT — STATUTE SEPARATING WHITES AND NEGROES IN PRIVATE INSTITUTIONS OF LEARNING. — A Kentucky statute made it an offense to conduct any institution of learning in which both white and colored persons were received as pupils unless it was conducted in separate branches. *Held*, that the statute is valid as a reasonable exercise of the

police power in so far as it prevents the attendance of members of the two races at the same time and in the same place. *Berea College v. Commonwealth*, 94 S. W. Rep. 623 (Ky.).

That reasonableness is the test in determining the validity of statutes passed in the exercise of the police power is well established. See 17 HARV. L. REV. 275. Many statutes aimed at accomplishing the separation of the white and colored races in several relations in life have been held constitutional on this ground. Thus intermarriage between the races is forbidden in several states. *Ex parte Hobbs*, 1 Woods (U. S. C. C.) 537; *State v. Gibson*, 36 Ind. 389. Statutes have also made it unlawful for members of one race to travel in railway compartments provided for the other, or for railway companies to fail to provide separate compartments. *Plessy v. Ferguson*, 163 U. S. 537. Similarly, separation of the races in the public schools has been permitted. *Cisco v. School Board*, 161 N. Y. 598. In the present case the court bases its judgment on the same argument used to support the statutes just referred to, — namely, the reasonableness of preventing relations which might lead to intermarriage and to breaches of the peace, — but, as the present statute extends to private institutions, the decision apparently goes further than in any previous case, and probably reaches the limit.

RIGHT OF PRIVACY — INFRINGEMENT — UNAUTHORIZED PUBLICATION OF PORTRAIT. — Post cards illustrating imaginary scenes in the life of the plaintiff, including views of herself, were published and sold without her consent and against her objections. She applied for an injunction to restrain the sale of the post cards. *Held*, that the plaintiff has established no right to restrain the publication. *Corelli v. Wall*, 22 T. L. R. 532 (Eng., Ch. D., May 10, 1906).

The English law has refused to restrain the unauthorized use of a name for advertising. *Dockrell v. Dougall*, 78 L. T. 840. But the right of a private person to restrain the unauthorized publication of a portrait of himself has been left undetermined. See *Monson v. Tussauds*, [1894] 1 Q. B. 671. The present decision, however, seems to settle the English law for the present against allowing such restraint, thus differing from the latest decision in this country. See 18 HARV. L. REV. 625.

TAXATION — TAX ON SUCCESSION TO PROPERTY BY BEQUEST — ASSIGNMENT OF LEGACY BY COLLATERAL LEGATEE. — A testator having bequeathed his residuary estate to persons who were also recipients of general legacies, the heir at law and next of kin prepared to contest the will. A compromise was effected whereby, in consideration of an assignment by the legatees of their residuary interest in the estate, the heir at law and next of kin consented that the will should be admitted to probate. *Held*, that the succession tax should be assessed at the same rate as if the residuary legacy had originally been to the next of kin and heir at law. *In re Cook's Estate*, 99 N. Y. Supp. 1049.

The court seeks support for this decision in a previous New York case. *Matter of Wolfe*, 89 App. Div. 340, affirmed in 179 N. Y. 599. But that case decided merely that when the original legatees, subject to the higher tax rate, refused to accept the legacy, thus allowing it to fall into the general residue and pass as part thereof, it should be taxed at the lower rate provided for the succession which actually took place. As a legatee may of course refuse a legacy, that decision was manifestly correct. But in the principal case there was no refusal, and by the terms of the will, as finally probated, the legacy went to the original collateral legatees, passing from them only by their assignment. It seems a substantial injustice to the state that its rights should thereby be defeated. A Pennsylvania case is directly in accord with the present decision. *Pepper's Estate*, 159 Pa. St. 508; see *Frank's Estate*, 9 Pa. Co. Ct. 662. On principle, however, supported by some authority, the case seems clearly wrong. *Harrison v. Johnston*, 109 Tenn. 245.

TRUSTS — POWERS OF TRUSTEE — POWER TO GIVE A LEASE WHICH MAY EXTEND BEYOND THE TRUST TERM. — A trustee under a will devising realty to her with power to sell, and further providing that if the trustee made no sale the property on her death should go to a third party with power to sell, leased

the land to the plaintiffs for a term of years. The plaintiffs entered and improved the property. The trustee died before the expiration of the term, and the third party sold to the defendants, who had notice of the lease. The defendants brought summary proceedings, and the plaintiffs sought an injunction. *Held*, that the relief should be granted. *Butler v. Topkis*, 63 Atl. Rep. 646 (Del., Ch.).

Generally a power to sell does not by implication include a power to lease. *Waldron v. Chasteney*, 2 Blatchf. (U. S. C. C.) 62. But where the land is vested in trustees, with the intention that they shall raise an income therefrom, a power to lease may be implied where it is reasonable and necessary. *Fitzpatrick v. Waring*, 11 L. R. Ir. 35; *Hutcheson v. Hodnett*, 115 Ga. 990. A lease, however, or a covenant of renewal, will generally not be upheld for a term greater than the life of the trust estate. *Bergengren v. Aldrich*, 139 Mass. 259; *Gomez v. Gomez*, 81 Hun (N. Y.) 566. Yet in a few instances the courts have sustained such a lease where the life of the trust estate was indeterminate. *Greason v. Keteltas*, 17 N. Y. 491. In the case at hand the power to sell seems to be permissive only; a lease, therefore, cannot be said to be in conflict therewith. It seems clearly a case where equity in the exercise of its discretion should favor a lessee who in good faith has made improvements, as against a purchaser, with notice of the lease, from the remainderman.

WILLS — REVOCATION — EFFECT OF REVOCATORY WORDS ON BACK OF WILL. — After the testator's death there was found on the back of his will a signed, but unwitnessed, statement that it was revoked. *Held*, that under the New York statute which permits revocation by burning, tearing, cancelling, obliterating, or destroying, this does not amount to cancellation of the instrument. *Matter of Miller*, 50 N. Y. Misc. 70.

The majority of cases in this country hold that the writing of a revocation is not effectual as a cancellation unless it cancels some material part of the writing in the will. *Howard v. Hunter*, 115 Ga. 357. Accordingly, words of revocation in the margin of the will have been held not enough. *Lewis v. Lewis*, 2 Watts & S. (Pa.) 455. This is true, even though these words slightly touch a part of the writing in the will, provided that part is immaterial. *Matter of Akers*, 74 N. Y. App. Div. 461; *Oetjen v. Oetjen*, 115 Ga. 1004. In Vermont, however, revocatory words have been held effective as a cancellation when written on the back of the page containing the material parts of the will. *Warner v. Warner's Estate*, 37 Vt. 356. Such a decision might possibly be reconciled with the main body of authority by the consideration that the words were written upon a part of the paper that could not be detached so as to leave the material matter intact. See *Will of Mary Ladd*, 60 Wis. 187. But the present decision, which is squarely contrary to the Vermont case, adopts what is probably the soundest construction of statutes similar to that in New York by requiring that the revocatory words be actually written over a material part of the will.

WITNESSES — PRIVILEGE AGAINST SELF-CRIMINATION — CONSTRUCTION OF STATUTE. — A Wisconsin statute provided that a witness under certain circumstances should not be excused from testifying on the ground that his testimony might tend to criminate him, but that he should not be prosecuted on account of anything concerning which he might testify. *Held*, that the statute is no broader than the constitutional guaranty against self-crimination, and therefore gives no immunity for testimony not in fact self-criminatory, or for testimony not given under compulsion. *State v. Murphy*, 107 N. W. Rep. 470 (Wis.). See NOTES, p. 61.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

CONSTITUTIONAL LIMITS OF THE CONTROL BY THE STATE OVER MUNICIPAL CORPORATIONS. — The power of the legislature to alter or abolish a municipal corporation, and the effect of such alteration and abolition on the liabilities of the corporation and the rights of third parties are the occasion for an interesting article in the Virginia Law Register. *The Rights of Creditors of a Municipal Corporation when the State has Passed a Law to Abolish or Alter It*, by Richard W. Flournoy, Jr., 12 Va. L. Reg. 175 (July, 1906). The subject is treated under three heads: 1. where one or more new corporations are created in place of the old; 2. where a municipal corporation is abolished by act of the legislature, and its territory and inhabitants remanded to the government of the state, no adequate provision being made for the payment of creditors of the defunct municipality; 3. where the original municipality remains in existence, but a part of its territory and population is taken away and formed into a new municipal corporation. In regard to the first proposition the writer holds the view that the new corporation will be liable for the debts of the old in proportion to the amount of property taken over. This opinion seems well established by authority. See *Mount Pleasant v. Beckwith*, 100 U. S. 514; *Mobile v. Watson*, 116 U. S. 289. The doctrine must be supported on broad grounds of public policy and equity rather than on any technical rules. Under the third head the writer's view that where the original municipality is shorn of a part of its territory, the old and the new corporations should bear the burden of indebtedness proportionately to the amount of territory and population taken away and retained, seems in accord with the same sound views. The law, as is admitted, appears to be the other way, but has apparently not been tested in an extreme case.

In regard to the second proposition it is maintained that the law is apparently "that a state legislature cannot, under the constitution, abolish a municipal corporation without either making adequate provision for the payment of its debts, or else creating another municipality in its place." The argument against such legislative action is that it violates the provision of the federal constitution that no state shall pass any law impairing the obligation of contracts. This would be so if abolishing the municipal charter abolished the debt, but it has been distinctly held that this is not so. The debt remains in force, and if later the old municipality is reincorporated or embodied within the limits of one already existing, the creditor may sue such new municipality and the time elapsing during the interval cannot be used against him as a defense under the Statute of Limitations. See *Broadfoot v. City of Fayetteville*, 32 S. E. Rep. 804, 808 (Tenn.). The writer accepts the proposition that if a new corporation is later created, the creditor may sue that; but it is hard to see, if the law abolishing the old corporation was unconstitutional, how a later act re-establishing the municipality cures the defect in the first. The second act presupposes the constitutionality of the first. Many of the cases which the author cites do not support his proposition. For instance, the case of *Wolff v. New Orleans* (103 U. S. 358) is not a case where the state attempted to abolish a city charter at all, but where, without doing so, it attempted to curtail the taxing power of the city, whereby the security of the bondholders was diminished.

As has been intimated, the doctrine worked out by the writer is not necessary to protect the rights of the creditor, for a reincorporation will usually take place. Even if no new corporation were formed, the aid of equity might be invoked to form a taxing district within the limits of the old. A recent case allowed *mandamus* proceedings after the abolition of a township to compel the auditor and treasurer of the county to collect the taxes for the benefit of the creditors. See *Graham v. Folsom*, 200 U. S. 248. With these safeguards for the rights

of the creditor, it seems hardly advisable to put the sharp limitation which is advocated on the control of the legislature over the municipal corporation which it has created.

THE METAPHYSICAL NATURE OF A CORPORATION IN THE EYE OF THE LAW. — From the point of view of the man in the street a corporation is obviously a fiction. But this does not settle whether it is a fiction or a reality in the eye of the law. In a recent English article Mr. E. Hilton Young has given an interesting discussion of the question, in which he contends that while in theory a corporation exists only in the contemplation of the law which creates it, in practice it has become a real legal being apart therefrom. *The Legal Personality of a Foreign Corporation*, 22 L. Quar. Rev. 178 (April, 1906). His argument is, in brief, that a foreign corporation in theory does not exist outside of the sovereignty which creates it. Yet the courts of other sovereignties permit it to sue as plaintiff, and obtain personal jurisdiction of it as defendant. A court cannot obtain personal jurisdiction of that which in the eye of the law does not exist. Consequently, whatever the theory may be, for practical purposes a foreign corporation is a real legal being.

While the American authorities are in confusion, the general result seems to be a similar conflict between theory and practice. Indeed the seeds of it are found in Chief Justice Marshall's definition of a corporation as "an artificial being . . . existing only in contemplation of law." See *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 636. This definition has been approved by the weight of American authority. But metaphysically it seems to involve a contradiction. A being *ex hypothesi* exists. A "being" which at the same time exists and does not exist is certainly a peculiar metaphysical concept. Yet this is precisely the result reached by the cases. In theory a corporation in the jurisdiction which creates it is essentially a legal entity, apart from the individual stockholders composing it. The word "person" in a statute has been held sufficiently to describe it. See *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358. For purposes of federal jurisdiction it has been held to be a "citizen" of the state which creates it. See *Nashua & Lowell R. R. Corp. v. Boston & Lowell R. R. Corp.*, 136 U. S. 356. And yet courts of equity may rarely, where justice requires it, look behind the legal entity to the individual stockholders. See *Moore & Handley Hardware Co. v. Tower Hardware Co.*, 87 Ala. 206. A corporation, then, is generally regarded as existing in the state which creates it.

But it is equally well settled that since a corporation exists only in contemplation of the law it has no legal existence outside the state where that law operates. See *Augusta Bank v. Earle*, 13 Pet. (U. S.) 519, 588. Nevertheless, under the proper circumstances it may contract in another state by means of agents, and the courts thereof may by comity treat it as existent and permit it to sue on the contract. See *Augusta Bank v. Earle*, *supra*. But a foreign corporation may equally commit a tort or a nuisance. See *Austin v. N. Y. & E. R. R.*, 25 N. J. Law 381; *Seattle Gas & Electric Co. v. Citizens L. & P. Co.*, 123 Fed. Rep. 588. Comity, however, cannot give jurisdiction of a non-existent corporation when those aggrieved desire to serve it. Consequently, in the absence of statute, it is impossible to bring action *in personam* against a foreign corporation. See *Middlebrooks v. Springfield Ins. Co.*, 14 Conn. 301. In the absence of statute, therefore, it can act, but cannot be brought to account. But a corporation, though a "citizen" of its own state for purposes of jurisdiction, is not a "citizen" within the meaning of article 4, § 2 of the United States Constitution, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." See *Ducat v. City of Chicago*, 48 Ill. 172. Consequently a state may lay down the conditions under which a foreign corporation may do business therein. See *Paul v. Virginia*, 8 Wall. (U. S.) 168. Most of our states have therefore passed statutes compelling foreign corporations which do business within the state to

submit to the jurisdiction of the courts. See 6 THOMP., CORP., § 7971. The total result apparently is that a corporation exists within its own state in theory, but not always in practice; while in a foreign state it does not exist in theory, although in practice it is often treated as if it did. Metaphysically, therefore, it seems very like a non-existent being.

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- ABUSED PRIVILEGE, AN. *W. A. Purrington*. Maintaining that the privilege accorded a physician of not testifying is greatly abused. 6 Columbia L. Rev. 388.
- ASPECTS OF FORGED TRANSFERS OF STOCK, SOME. *Lee M. Friedman*. Disagreeing with a recent decision of the House of Lords, *Sheffield Corporation v. Barclay*, [1905] A. C. 392. 40 Am. L. Rev. 496.
- BASIS OF CASE LAW. I. *A. H. F. Lefroy*. Treating of the basis of case law when there is no previously established legal principle to govern the case. 22 L. Quar. Rev. 293.
- CALVO AND THE "CALVO DOCTRINE." *Percy Bordwell*. Non-payment of public debts as warrant for armed intervention. 18 Green Bag 377.
- CAN STOCK WITH EXCLUSIVE VOTING POWER BE TREATED AS A TRUST? *Robert Rentoul Reed*. 18 Green Bag 383.
- CAN THE UNAUTHORIZED ACT OF AN AGENT BE RATIFIED BY THE PRINCIPAL AFTER THE THIRD PARTY HAS RECEDED FROM THE CONTRACT? *Wilmer T. Fox*. Contending that such ratification should not be allowed. 62 Cent. L. J. 338.
- CASE OF THE BRIG GENERAL ARMSTRONG, THE. *Charles Noble Gregory*. 18 Green Bag 331.
- CLOSED SHOP CONTROVERSY, THE. *Charles R. Darling*. 18 Green Bag 339. See 19 HARV. L. REV. 368.
- COMPULSORY EXHIBITION BY PLAINTIFF IN PERSONAL INJURY SUITS. *Thomas Hall Shastid*. A review of the law in different states. 23 Medico-Leg. J. 629.
- DIVORCE CONGRESS AND SUGGESTED IMPROVEMENTS IN THE STATUTORY LAW RELATING TO DIVORCE, THE. *C. La Rue Munson*. 15 Yale L. J. 405.
- DOCTRINE OF THE FEDERAL COURTS AS TO THE VALIDITY OF IRREGULAR MUNICIPAL BONDS, THE. *Charles L. Dibble*. Discussing the effect of non-compliance with legal restrictions and the application of the doctrine of equitable estoppel. 4 Mich. L. Rev. 497.
- EVIDENCE STATUTES THAT ILLINOIS OUGHT TO HAVE, SOME. *John H. Wigmore*. 1 Ill. L. Rev. 9.
- EXCHANGE OF STOCK FOR CAPITALIZED PROFITS. *H. S. Richards*. 4 Mich. L. Rev. 526.
- GREAT USURPATION, THE. *William Trickett*. Attacking the authority of the courts to pass upon the constitutionality of legislation. 40 Am. L. Rev. 356.
- INDIVIDUALISM OF THE CONSTITUTION, THE. *Andrew Alexander Bruce*. Discussing the holdings of the Supreme Court of the United States as to the constitutionality of local regulations of contracts. 62 Cent. L. J. 377.
- IS ONE CLAIMING TITLE UNDER A QUITCLAIM DEED A BONA FIDE PURCHASER? *L. W. Carr*. Arguing that he is. 4 Mich. L. Rev. 602.
- JOINDER OF ACTIONS IN FIRE INSURANCE LITIGATION. *Frederick T. Case*. 18 Green Bag 392.
- JURY TRIAL AND THE FEDERAL CONSTITUTION. *William Cullen Dennis*. Arguing that the federal constitution does not require jury trials. 6 Columbia L. Rev. 423.
- LAW OF ENGLAND AS REGARDS MARRIED WOMEN'S CONTRACTS, AND THE POWER OF A WIFE TO BIND HER HUSBAND TO HER CONTRACTS, THE. I. *G. Addison Smith*. Briefly stating the authorities. 14 Scots L. T. 35.
- LEGAL CONCEPTIONS FROM A PRACTICAL POINT OF VIEW. *James Edward Hogg*. Showing the difficulty of reconciling legal conceptions with practical decisions. 22 L. Quar. Rev. 172.
- LEGAL PERSONALITY OF A FOREIGN CORPORATION, THE. *E. Hilton Young*. 22 L. Quar. Rev. 178. See *supra*.
- LEGITIMACY OF "BUSINESS METHODS" IN THE LAW, THE. *Raymond D. Thurber*. A consideration of the restrictions placed upon lawyers in their efforts to secure cases by the statutes on champerty. 5 Bench & Bar 51.
- LIMITATIONS UNDER WHICH A PUBLIC SERVICE COMPANY MUST CONDUCT AN INDEPENDENT BUSINESS. *Bruce Wyman*. 18 Green Bag 290.
- MAN AND HIS NAME, A. *Bernard C. Steiner*. Collecting the authorities. 15 Yale L. J. 341.

- MANX LAND TENURE. *Reginald D. Farrant*. 22 L. Quar. Rev. 136.
- MARRIAGE IN OLD ROME. *R. Vashon Rogers*. 18 Green Bag 402.
- MEDIEVAL INNKEEPER AND HIS RESPONSIBILITY, THE. *Joseph H. Beale, Jr.* 18 Green Bag 269.
- MISCONDUCT OF THE BENCH AS REVERSIBLE ERROR. *William A. Purrington*. 5 Bench & Bar 10.
- NATIONAL BANK AS STOCKHOLDER IN OTHER CORPORATIONS. *Anon.* 23 Banking L. J. 357.
- OBSERVATIONS CONCERNING CAUTIONARY INSTRUCTIONS TO JURIES, SOME. *Eugene McQuillin*. Collecting the cases and summarizing the holdings upon this subject. 63 Cent. L. J. 5.
- PART PAYMENT OF CLAIM AS ACCORD AND SATISFACTION. *Raymond D. Thurber*. 5 Bench & Bar 90.
- PARTITION OF A VESSEL IN ADMIRALTY. *James D. Dewell, Jr.* 15 Yale L. J. 394.
- POINT IN THE INTERPRETATION OF STATUTES, A. *H. B. Higgins*. Stating the case where Act B defines the meaning of words in Act A, and is later repealed. 3 Commonwealth L. Rev. 155.
- PRINCIPLES OF CHINESE LAW AND EQUITY, THE. *Edward H. Parker*. 22 L. Quar. Rev. 190.
- PROPOSED ACT RELATING TO INTERSTATE BILLS OF LADING, THE. *Thomas B. Paton*. An address before the New Jersey Bankers' Association, 1906. 23 Banking L. J. 401.
- RECENT CHAPTER OF THE ENGLISH CONSTITUTION, A. *D. H. Chamberlain*. A discussion of Mr. Balfour's refusal to resign or to dissolve Parliament in July, 1905. 15 Yale L. J. 315.
- REFORM IN CRIMINAL LAW OF GERMANY. *Ernest Bruncken*. 68 Alb. L. J. III.
- RESULTING TRUSTS AND THE STATUTE OF FRAUDS. *Harlan F. Stone*. Contending that in the case of a conveyance on an oral trust for the grantor there should be a resulting trust in his favor. 6 Columbia L. Rev. 326.
- RIGHT OF JURY TRIAL IN THE DEPENDENCIES, THE. *James Wilford Garner*. Commenting on four recent United States Supreme Court decisions. 40 Am. L. Rev. 340.
- RIGHTS OF CREDITORS OF A MUNICIPAL CORPORATION WHEN THE STATE HAS PASSED A LAW TO ABOLISH OR ALTER IT, THE. *Richard W. Flournoy*. 12 Va. L. Reg. 175. See *supra*.
- RIGHTS AND LIABILITIES OF FOREIGN INSURANCE COMPANIES IN CANADA. *E. Lafleur*. 5 Can. L. Rev. 249.
- SOUL OF THE PROFESSION, THE. *Charles F. Chamberlayne*. Advocating the teaching of legal ethics in law schools. 18 Green Bag 396.
- SPECIAL LEGISLATION AS DEFINED IN THE ILLINOIS CASES. *Albert M. Kales*. 1 Ill. L. Rev. 63.
- STATE REGULATION OF RAILROAD RATES AND CHARGES. *Andrew Alexander Bruce*. A discussion of the underlying theory and its practical application. 62 Cent. L. J. 458.
- STATUTORY REGULATION OF EMPLOYER AND EMPLOYEE. *O. H. Myrick*. 63 Cent. L. J. 43.
- TOBACCO TRUST DECISIONS, THE. *Henry W. Taft*. Upholding the recent decisions that a corporation could not refuse to produce its books at the instance of the state. 6 Columbia L. Rev. 375.
- TWO RECENT CASES ON INTERSTATE MARITAL RELATIONS. *H. A. Bigelow*. Comparing *Haddock v. Haddock* with *Atherton v. Atherton*. 18 Green Bag 348.
- VALIDITY OF CONTRACTS BETWEEN CORPORATIONS HAVING COMMON DIRECTORS, THE. *Harold M. Bowman*. 4 Mich. L. Rev. 577.
- VALIDITY OF MUNICIPAL ORDINANCES REGULATING THE INSPECTION AND SALE OF MILK AND CREAM. *Eugene McQuillin*. Collecting the authorities. 62 Cent. L. J. 439.
- VALIDITY OF STATE STATUTES PROHIBITING CONTRACTS OF EXEMPTION BY CARRIERS CONCERNING INTERSTATE COMMERCE, THE. *J. R. Tucker*. An argument in favor of their constitutionality. 12 Va. L. Reg. 1.

II. BOOK REVIEWS.

JURISPRUDENCE, LAW, AND ETHICS. PROFESSIONAL ETHICS. By Edgar B. Kinkead. New York: The Banks Law Publishing Company. 1905. pp. vii, 381. 8vo.

This is largely a book of quotations, of familiar quotations, from the current treatises on jurisprudence. The learned author has confined himself to books in English. The passages cited are naturally of very different merit; some are wise, some are silly, many are vapid. Mr. Kinkead gives them all with perfect impartiality. They form a jumble of contradictions. Mr. Austin, for instance, has little in common with Professor Lorimer. The reader perusing them all would certainly have food for thought, but for rather perplexed thought. Nor would the author, we are afraid, much help him out of his perplexity. Professor Kinkead has often given the different views of a problem without seeking to solve it.

The main thesis of the treatise is that law has something to do with morals, but exactly what is not made clear. Indeed the book is not free from faults common to many of its class, a failure in precision and definition, an unwillingness to grapple closely with facts, and a disposition to slip off into profitless generalities.

Thus, p. 98. "Opinions differ, some regarding the Roman law as clumsy, bombastic in language, while others regard it as a model." Is the Roman law clumsy and bombastic in language? Is the Roman law a model, and if yea, for what is it a model?

P. 152. "Transcendental ethical theories may be found on paper, but are not present when lawyers and judges are called upon to act."

What are transcendental ethics? How do they differ from other ethics? Why are they not present as alleged?

P. 167. "But Ethics diverges from Psychology, because the science of human duty is to be determined by the outward acts of men, though they may parallel in so far as it may be necessary to resort to well-settled theories."

By what is psychology determined unless by the outward acts of men? How far is it necessary to resort to well-settled theories? What theories are well settled?

P. 205. "A flatly absurd rule or unjust decision within the jurisdiction, for practical purposes, must be acknowledged to be both the source and the evidence of the law, until overruled or changed."

Is there any different acknowledgment to be made for theoretical purposes? If so, how and why?

P. 205. "If it is not in harmony with the moral principle, it may not be regarded as sound law, but nevertheless it will operate as law until overruled or modified by the legislature."

Is it to be regarded as sound law? Does sound law mean law as it is or law as it ought to be? What is the difference between "being" law and "operating as" law?

We might go on indefinitely.

Yet one cannot but be glad that the learned author has confined himself mainly to generalities, however vague and contradictory, when one sees how he deals with a special case, in accepting the Maybrick legend.

He tells us that Mrs. Maybrick was "a beautiful, cultured, highly connected lady"; that her conviction seems to have been brought about by the tyranny of an English judge who "was seized with a frenzy because he thought this American woman had been untrue to her marriage vows"; that "the suspicion of Mrs. Maybrick's complicity consisted of the fact that arsenic had been found in his [her husband's] body, that arsenic was found in his medicines, in his victuals"; that "it was not shown in the trial that Mrs. Maybrick ever anywhere purchased any arsenic"; and that "this once beautiful American lady, who was related to a Chief Justice of the United States and to other prominent American people, remained for years in a solitary English prison."

Would any one suppose from this that the fact of the woman's being an adulteress rested not on the "thought" of a judge "seized with a frenzy," but on her confession in open court; that it was proved and had to be admitted by her counsel and herself that she did buy fly-papers for the purpose of preparing a solution of arsenic, and did prepare such a solution; and that she put a white powder into a bottle of liquid food in which arsenic was detected. Her excuse was that she wanted the solution of arsenic as a cosmetic, and that her husband told her to put in the powder. The jury did not believe her, and in view of the fact that on a Wednesday when the doctor considered that her husband was recovering from an attack of nervous dyspepsia she wrote to her paramour that her husband was "sick unto death," and that her husband did die on Friday, it would have been strange if they had believed her.

On p. 138, Professor Kinkead says, "inspired by a spirit of patriotism, if for no other reason, Americans should lay claims of superiority to [*sic*] its governmental and legal systems." This is an odd bit of chauvinism to find in a treatise on jurisprudence. Yet the English can doubtless learn many things from us to their advantage. But we are afraid a steady and unhysterical administration of criminal law is not among them.

It is the just boast of the English courts that on the trial of an indictment even-handed justice is dealt out without regard to looks or education or station. The judge holds the jury up to the law and the facts. "A beautiful, cultured, highly connected lady" related to a Chief Justice and other prominent people, who murders by poison, runs as good a chance of conviction as an ugly, ignorant, friendless man who is cousin to nobody. We regret to say that might not be universally true in this country.

Mr. Kinkead's treatment of the Maybrick case is an odd sequel to a discussion on the identity of law and ethics.

It is only fair to say, however, that we have observed nothing else so bad in the book.

J. C. G.

AN ESSAY ON THE PRINCIPLES OF CIRCUMSTANTIAL EVIDENCE, illustrated by Numerous Cases. By William Wills. Fifth English Edition of 1902, edited by Sir Alfred Wills, with American Notes by George E. Beers and Arthur L. Corbin. Boston: Boston Book Co. 1905. pp. xiii, 448, and about 150 extra lettered pages with the American Notes. 8vo.

It is good to have this book renewed in life. It now enters on its third generation, and the English editor has carefully preserved its freshness by adding new illustrations drawn chiefly from the reports in the Old Bailey Papers and the London *Times* during the last forty years. First published in 1838, it became famous abroad as well as at home, and has long served as an arsenal for countless forensic arguments and as a *vade mecum* for criminal practitioners. There is a sentimental touch in the circumstance that this English edition comes from the hand of the author's son, now a judge, and that two of his grandsons, one a medical man and the other a barrister, have assisted in the work.

We are glad to notice that in the preface the English editor properly pillories the flagrant literary looting done in 1896 by an American treatise entitled "A Treatise on the Law of Circumstantial Evidence, by Arthur P. Will, of the Chicago Bar." It was remarkable enough that a person of that name should be drawn to write a book on the same subject and under the same title as this already famous book by the author *Wills*. We thought so at the time, and have more than once publicly commented on the moral aspect of such a course. But it now further appears, from Justice Wills' preface, that this American book of 1896, out of 315 pages in the English Book of 1862, appropriated bodily all but 6 pages of a statutory tenor and 365 lines of the remainder. We trust that every library which contains the American piracy will now throw it into the waste-basket, mark out the title in the catalogue, and put the present work

in its place. There are two or three other works which ought to be similarly excommunicated, — but that is another story.

The English editor has well perpetuated the spirit of the original by his illustrations from modern trials. The footprints, the bloodstains, the laundry numbers on the linen, the arsenic in the tarts, the water-mark on the paper, and the ballad in the bullet-wad, — these familiar stage-accessories of crime and detection reappear in new varieties to illustrate and to convince. Of course, we are opposed to the plan here followed of interpolating additions to a classical treatise without printers' marks to attribute *suum cuique*; but that is a minor matter. The usefulness of the book has been preserved as well as though it were just written.

The American Notes, which are placed at the end of each chapter and make about one-fourth of the book, have collated a large number of American decisions ranging over the whole subject, — how many cannot be told, for by some oddity there is no table of cases. It would seem that they have not been adequately worked over to form a real commentary on the text, and they also seem scrappy; for example, at p. 32 the author says that Coke's old distinction of presumption as "violent or necessary, probable or grave, and slight," is "specious and fanciful, rather than practical and real"; and yet at p. 422 *a* the American note quotes in full, from an old opinion of Walworth, in New York, somewhere back in 1840, an elaborate statement of the same worn-out distinction, without comment or cross-reference. Moreover, the reader should not be left ignorant of the modern repudiation of the prevailing use of "presumption" as meaning "inference" in the author's day.

But the chief disappointment is that the American Notes do not fit the spirit of the original book. Apart from the Molineux case, and a few others, the Notes consist merely of citations of decisions on abstract rules of law. Now the main virtue of the book has always lain in its copious illustrations of the probative force of different circumstances of inference, regardless of the rules of evidence. In the American annals there is a vast wealth of such illustrations. Some day a book founded on a thorough search of this material will do for us the same service which the original book has done for England. J. H. W.

A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE ACTION OF EJECTMENT AND STATUTORY SUBSTITUTES. By Geo. W. Warvelle. Chicago: T. H. Flood and Company. 1905. pp. lviii, 679. 8vo.

As the scope of this excellent work is much broader than its title suggests (since it treats adequately the entire subject of trial of disputed land titles), it will unquestionably be found of great assistance to members of the legal profession engaged in any kind of litigation involving this branch of the law, especially in the preparation of their cases for trial. Examination of the book, we are pleased to say, shows it to be a clearly written and intelligent piece of work, bearing evidence of painstaking research and careful study on the part of the author, and confirms the statement of the author in his preface, that "the work is essentially a treatise, not a digest." In this latter respect, happily, it differs from many recent so-called text-books, which appear to be mere compilations of headnotes and digest paragraphs, thrown together with some attempt, — though often very slight, — at topical arrangement.

A few of the author's statements of law call for comment. Thus the statement on p. 440 that "even at common law a bastard might inherit from his mother" we think is not supported by the authorities. See COM. DIG., Bastard (E), Descent (C) 12; 1 BL. COM., Bk. I., ch. 16, §459; 4 KENT COM. §413. Again at p. 368, as we understand the text, the author says that if a will has once been admitted to probate and is thereafter lost or destroyed, its contents may be proved by parol evidence; but "if the will had not been admitted to probate, no testimony concerning it should be received." It is well settled

that the contents of a lost or destroyed will may be established by parol testimony, and when so established may be admitted to probate as the will of the deceased. See, in addition to the well-known cases of *Davis v. Sigourney*, 8 Met. 487, and *Sugden v. St. Leonards*, 1 P. D. 154, the recent and interesting case of *Tarbell v. Forbes*, 177 Mass. 238.

The citation of cases is, professedly, not exhaustive (Preface, p. vi). It would nevertheless seem that all leading cases, such for example as those just cited, require notice. It also seems surprising that in his discussion of proof of heirship by the records and decrees of probate courts, the author makes no reference whatever to so important a case as *Shores v. Hooper* (153 Mass. 228). Moreover, while on the subject of citation, the author's lack of uniformity in his mode of citing cases should be referred to. Some attempt is made at giving, in addition to the reference to the official reports, parallel references to the National Reporter System, the American State Reports, etc. Such parallel references, however, are not habitually, or even frequently, given. Often they are wholly omitted; sometimes they are given when a case is first cited and not given when the same case is again cited on a later page. Again, in his citation of decisions of the United States Supreme Court, this same lack of uniformity appears. Thus *Cincinnati v. White* is cited on pp. 43 and 44 as reported in 31 U. S. 431; on p. 267, as in 6 Peters 431. Other instances of the same sort could be given. Personally we prefer the latter form of citation, since we believe it is in more general use among the profession, and that the employment of a different form of citation simply confuses, annoys, and delays the practitioner. But at all events we feel certain that one form or other should be adopted by an author and consistently adhered to throughout his work.

The faults of this work, however, are small when compared with its real merits and practical value; and we have no desire to obscure the latter by a prolonged discussion of the former. A few misprints have been noticed, for the most part unimportant (see pp. 43, 391, 392; *Arnold v. Cheeseborough*, cited on p. 413 as in 85 Fed., is reported in 58 Fed.) We have also noticed that neither *Stein v. Bowman*, cited on p. 428, nor *De Lane v. Moore*, cited on p. 417, is listed in the table of cases.

S. H. H.

A SUMMARY OF TORTS. By Frank A. Erwin. Second Edition, revised and enlarged. New York: Leslie J. Tompkins. 1906. pp. viii, 225. 8vo.

This book presents in brief and excellent form the general principles of the law of Torts. The industry and judgment of the author are apparent, not in the matter of the work, which is almost wholly non-original, but in the choice and arrangement of the material. Almost every statement is quoted *verbatim*, with appropriate quotation-marks and references, from decisions in leading cases or the commentaries of well-known authors. One might expect to find the effect thus produced fragmentary, and to be impressed by the absence of coherence and logical sequence; but so skillfully has Professor Erwin done his work as weaver and so aptly has he supplied the necessary links of connective and explanatory sentences, that the book is not only an orderly treatment of the leading topics in the law, but it is distinctly readable as well. The analysis follows that which has been commonly adopted in larger and more pretentious text-books: treating first the general considerations involved in all cases of tort, and taking up then the specific classes of wrongs *ex delicto* for which the law gives redress. The general discussion includes a statement of principles which might be grouped with equal or greater logic under other headings in the law, such as the rules governing the liability of a principal for acts of his agent, the fellow servant rule, the liability of corporations for torts *intra* and *ultra vires*, and the survivorship of actions for personal injuries; but these rules, though dependent upon principles not inherent in any theories of tort, are of such

frequent and necessary application in tort cases that their treatment in commentaries on the law of Torts is as reasonable and convenient as it is common. In the specific classes of cases discussed one finds the familiar headings of Assault, False Imprisonment, Libel and Slander, Deceit, Malicious Prosecution, Seduction, Trespass, Trover and Conversion, Nuisance and Negligence. The important related topics of Strikes and Boycotts and Interference with Contract Relations are, however, not considered, — an omission to be regretted because of the modern importance and intricacy of the problems which those topics present.

A distinguishing characteristic of Professor Erwin's book is the large proportion of citations from New York. Probably three quotations out of four are from opinions rendered by New York courts, inferior or of last resort. This feature must peculiarly adapt the book to use by students especially interested in New York law; but it will not necessarily impair its utility in other jurisdictions, since the decisions quoted are in most cases fair statements of principles recognized generally wherever the common law of Torts prevails. Moreover, conflict of authority on important points is indicated. New York statutory provisions are not infrequently specially referred to and stated, *e. g.*, the Employers' Liability Act and the provisions governing actions for death by wrongful act. It is fair to presume, though no express statement to that effect is made, that in preparing this manual Professor Erwin had chiefly in mind the needs of his classes in the New York University School of Law. To their purposes, and to the purposes of students similarly situated, the book is admirably adapted, especially when used in connection with lectures covering in more detail the subjects here broadly considered. For the practitioner it is of small practical service save to refresh his memory on elementary principles: there is no table of cases, and the citations are manifestly not designed to be either exhaustive or especially representative of all jurisdictions. As a concise statement of the common law rules for purposes of review by candidates for admission to the bar, the book may be distinctly commended.

In the interests of accuracy, and in view of the possibility of further editions, it may be noted that the statement on page 213, including Louisiana in the list of jurisdictions where the burden of proving the absence of contributory negligence rests upon the plaintiff, is incorrect. See *Buechner v. City of New Orleans*, 112 La. 599.
M. M. L.

A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS. By Howard S. Abbott. In three volumes. Volumes I and II. St. Paul: Keefe-Davidson Company. 1905, 1906. pp. xix, 1-965; xvi, 966-1979. 8vo.

In writing a book on the law of Municipal Corporations, an author necessarily challenges comparison with Judge Dillon's classic treatise; yet he is not to be considered unsuccessful if he fails to improve on it. To write a law book worthy to rank alongside Dillon is in itself an achievement worth the effort. Mr. Abbott is to be congratulated on having produced a book which, even if it does not supersede the older and better known work, may be used with satisfaction, and quoted with safety and assurance.

The division of the whole subject differs from the division made by Judge Dillon. The present author's division is logically planned and executed, and is on the whole clear and adequate; but there does not seem to be any conspicuous advantage in the new arrangement.

In his preface Mr. Abbott writes: "An effort has been made to state in the text, concisely and accurately, the general principles applicable to a stated question, and to give in the notes a reference to the cases, considering the subject under which they are cited, with in many instances an apt quotation from the decision of the court." This is certainly an admirable plan to have in mind in writing a law book, and for the most part the author seems to have lived up to it. Mr. Abbott has given us a real text: he has written a treatise and stated the theories underlying the various topics in the law of Municipal Corporations;

and he has avoided the pitfall of so many writers of law books in these days of hastily composed books,—the mere compilation of the head notes of cases to serve as a text. In all places, however, the text is not easy reading, due in part to the strain on the reader from the constant use by the author of the periodic form of sentence.

Mr. Abbott also promises, "An exhaustive examination and citation of the authorities has been made, and an index has been prepared unusually full and complete." It is impossible at this time to state absolutely that the promise of an exhaustive examination and citation of authorities has been fulfilled. Only two volumes of the three have been issued, and there is no table of reference to the cases cited, in either of the volumes. It should be said, however, that from a reading of the text and the notes it would seem that a careful collection of authorities has been made. In this connection it seems worth while to call attention to the excellent plan, adopted in recent years by some publishers, of putting in each volume of a multi-volume treatise a table of the cases cited in that volume, and also an analytic index of the subject matter. Such tables and indices certainly add to the value of a book for ready reference.

The citations themselves seem to be arranged alphabetically by jurisdictions, and chronologically within each jurisdiction. The chronological order within the jurisdictions is consistently maintained, but there is an occasional lapse from the alphabetical arrangement. It may also be questioned if the form of citation, 86 U. S. (19 Wall.), is better than the more usual citation to Wallace first.

So much of the value of a text-book to the practicing lawyer depends on a good index, rendering the text easily accessible, that if Mr. Abbott really gives us an "index unusually full and complete" as he leads us to hope, his book will be in great demand. For this we must wait until the third volume is published.

The topics of the liability of public corporations for negligence, and of actions by and against public corporations, together with a chapter to be entitled "Some Public Duties," have been left for the third volume. S. H. E. F.

THE GENERAL PRINCIPLES OF THE LAW OF CORPORATIONS (being the Yorke Prize Essay for the year 1902). By C. T. Carr. Cambridge: At the University Press. 1905. pp. xiii, 211. 8vo.

Following a suggestion of Professor Maitland, of an English Encyclopedia of Group-life, a work which should range over the field occupied by the various forms of English fellowship and association, the writer of this essay has attempted to deal "with one single form of group-life, namely, the class of bodies which, in the strict legal sense, are 'corporations.'" The general object of the book, as the author states, is "to show the nature and attributes of a corporation, the steps by which it reached its present legal form and importance, and the manner in which it has from time to time been treated by the state. The later chapters contain the more ambitious effort of analyzing the theory of corporations."

Starting out to fulfill such a suggestion as that of Professor Maitland, it naturally follows that the work, well executed, as it undoubtedly is, should be interesting and suggestive to the student of the history of English law, and of the development of its theories. But it should be noted that chapters entitled "Anthropomorphism," "Concession," "Registration," "Symbolism," "Realism," and some others, though suggestive to the student, will not attract many readers outside that class. In justice to the author, however, it should be remembered that this book is not published "to sell"; but, like many other books, more often, we may regret to find, written by Englishmen rather than Americans, it was done because the author had found something that was worth saying, and has been willing to put time and effort into it, for the sake of the few who will understand and be aided.

In an interesting chapter on the "corporation sole," Mr. Carr points out that this invention, "so proudly described by Blackstone, had turned out a failure. . . . It is the supreme test of the true corporation that its abstract personality should be independent of that of the sum of its members. The corporation sole cannot pass this test." Thus the fee simple is not vested in the abstract entity, but is declared to be in abeyance when the parson of a church dies; the corporation sole and its sole incorporator are not regarded as two separate bodies in their dealings with one another; nor are there any instances in which a sole corporation has been sued by its sole incorporator. "It is a fiction, but not fictitious enough for this."

The limits of this review forbid making many selections from Mr. Carr's book, but attention should be given to the excellent chapter, "The Corporation in the Courts." In this chapter, the author shows how by means of the doctrine of *ultra vires* results are reached which would not be reached at common law nor in equity; and in the section, "The Liability of a Corporation apart from Contracts," he demonstrates, after a careful collection of successive decisions, that an *ultra vires* act, though void, is none the less a corporate act; and he shows how gradually the principle of corporate liability has been extended to include "sins of commission."

To those who have not studied corporation law Mr. Carr's book would not be easy reading; but to those who have, it would repay the time that would be given it.

S. H. E. F.

THE CONSTITUTIONAL HISTORY OF NEW YORK. From the beginning of the colonial period to the year 1905, showing the origin, development, and judicial construction of the Constitution. By Charles Z. Lincoln. In five volumes. Rochester: The Lawyers' Co-Operative Publishing Company. 1906. pp. xxx, 756; xvii, 725; xviii, 757; xxvi, 800; 551. 8vo.

The first impression of this book is the astounding industry of the author in his examination of forgotten sources of information as to the earlier forms of the constitution of the state of New York. Beginning with the colonial charters and coming down through each successive form of the constitution of the state and its amendments, the author has minutely examined the records of conventions and contemporary conditions so that the book does show, as to each successive form of each clause of the constitution, where it originated and how, and why it became embodied in the constitution. The several forms of the constitution and the constitutional conventions are treated chronologically, but by means of cross references a topical treatment has been successfully carried out, and for the purposes of reference by this book any particular clause of the constitution can be traced back, through its various forms.

The main value of the work lies in the completeness of its topical analyses and the presentation of original sources of information as to the separate clauses of the constitution and their meaning. No other book has done that for the constitution of New York, and the work is of permanent value as presenting an authoritative statement of the genesis and causes of each separate clause of the constitution. The collation of judicial decisions interpreting the constitution, which makes up one volume of the book, is not notable. The decisions have been collected before with the same fullness, and the author's comments are not particularly illuminating. Unique appendices, however, of the various statutes, arranged both chronologically and topically, which have been passed upon by the New York courts, and declared constitutional or unconstitutional, give the book an immediate and ready value for the practicing lawyer dealing with constitutional questions under the state constitution. How far those lists are complete only the use of the book can tell, but the tables are intelligently compiled and are bound to be valuable.

The style of the book perhaps unavoidably tends to dullness; the personal reflections are hardly illuminating; and the attempts of the author to connect

clauses of the constitution with names of unimportant state statesmen are not worth the labor bestowed upon them. But, by and large, the author has accomplished a stupendous task carefully and well. J. P. C., JR.

A SELECTION OF CASES ON DOMESTIC RELATIONS AND THE LAW OF PERSONS. By Edwin H. Woodruff. Second Edition, enlarged. New York: Baker, Voorhis & Company. 1905. pp. xv, 624. 8vo.

The second edition of Professor Woodruff's "Selection of Cases on Domestic Relations and the Law of Persons" includes the same topics as the first edition, which has heretofore been noticed in this magazine.¹ This edition has been enlarged by the addition of a considerable number of recent cases, especially on the conflict of jurisdiction in divorce actions, and by brief notes. The excellent selection of cases in the first edition is maintained in the added cases. The space given the various topics is well proportioned. That the book is in its second edition and is in use in eight schools is sufficient evidence of its merit. It may not be unfitting, however, to refer to two features in which it would seem possible to improve it.

In common with a number of other case-books, Professor Woodruff has inserted extracts from decisions without any statement of the facts on which the decision is based. One of these, for example, is the extract from the decision in *Sims v. Rickets*, p. 159. It is admirable in itself, but in a case-book for teaching by the inductive method it is submitted that such extracts are of little value. If carried to an extreme, the result would be neither case-book nor text-book. Such extracts cannot be of much service in discussion and may confuse the student.

The second point is the suggestion that in an appendix there be given a complete statement of all the statutes of some jurisdiction on the law of Husband and Wife and of Marriage. This can be done in a few pages. The legislation is more nearly similar than may be supposed, and would do much to emphasize the excellent exposition of the common law in Professor Woodruff's cases, and assist in showing the tendency of legislation in recent years. N. A.

A TREATISE ON THE INCORPORATION AND ORGANIZATION OF CORPORATIONS created under the "Business Corporation Acts" of the several states and territories of the United States. By Thomas G. Frost. Second Edition, enlarged and revised. Boston: Little, Brown and Company. 1906. pp. xv, 698. 8vo.

The author in this book has accomplished a valuable work in presenting a comparative analysis of the incorporation acts of the various commonwealths. He has gathered together and tabulated in an admirable way much practical information concerning them. The forms for corporate charters, resolutions, etc., prepared by him, cannot but be helpful to the practitioner. The author is to be complimented upon his method of analysis, and for the clearness with which he expresses himself. In this regard his work might well be taken as a model by many of the text-writers of the present day. He has pointed out similarities and dissimilarities, wise and unwise provisions, in the different incorporation statutes, and it is to be hoped that his work is the beginning of an attempt to bring about some uniformity in the corporation laws of our different states. The author's treatment of the very perplexing problem of collateral attack upon corporation organization, stockholders' liability, and the control of

the state over domestic and foreign corporations, is a pleasing departure from the hackneyed method of a number of other writers who have given these subjects attention. His views are in some respects advanced, but in general he has stated concisely and correctly the best modern theory upon some of the more difficult problems of corporate law.

As to some propositions enunciated by him, he cannot expect to find general acquiescence. Upon the contrary, some of his most positive assertions will not only be disputed, but it is to be hoped that the courts will never establish them as authoritative principles. And it is upon these questions that the author has not used that degree of care which the work in hand required. A number of authorities cited by him not only do not support his assertions, but in several instances it is difficult to understand what prompted their citation. C. G. L.

SELECTED CASES ON THE LAW OF QUASI-CONTRACTS. By Edwin H. Woodruff. Indianapolis: The Bobbs-Merrill Company. 1905. pp. xvi, 692. 8vo.

Twenty years ago there was no law book devoted to the law of Quasi-Contracts. It is believed that the subject was not taught, as such, in any law school. The term quasi-contract may be found here and there in the reports, but it was so unfamiliar to the profession that Professor Keener hesitated long before giving to the collection of cases, which was published in 1888, the title "Cases on Quasi-Contracts." Since the appearance of this book, and the same author's excellent treatise upon the subject, issued in 1893, quasi-contracts has become a term in common use, and the subject now forms a part of the curriculum in twenty or more law schools.

Professor Keener's collection, admirable as it is, is somewhat too voluminous for the time that may be properly given to this subject. For this reason, doubtless, two new collections of cases on Quasi-Contracts appeared last year, one prepared by Professor James B. Scott, the other the subject of this review.

Professor Woodruff's book is essentially an American case-book, only 25 of his 305 cases, or 8 *per cent*, being English, whereas 110 out of 285, or 39 *per cent*, in Professor Scott's book, and 208 out of 377, or 68 *per cent*, in Professor Keener's book, are taken from the English reports. The editor must have had a purpose in discriminating against the English decisions, but he does not disclose it. This exclusion of English cases is the chief criticism to be made upon this book. The cases have been chosen with skill, and are well arranged, and the notes of the editor are accurate and helpful. A student who has mastered this collection of cases cannot fail to have a good grasp of the principles of the subject. J. B. A.

TRAITÉ DE LA LOCATION DES COFFRES-FORTS. Par M. Jules Valéry. Paris: Albert Fontemoing. 1905. pp. vi, 151. 8vo.

The comparatively new business of furnishing safe-deposit vaults, compartments in which may be hired by the public, is one that is having great development among all the commercial nations. The work of M. Valéry, who is professor of commercial law at the University of Montpellier, is a thorough study of the legal aspects of this business under the French Code, but with such a broad view of fundamentals and constant reference for arguments and illustrations to English and American jurisprudence, as well as to that of continental countries, that the treatise is of value to readers of all nations who are interested in the subject.

Professor Valéry develops first his theory of the nature of the contract between the company and its customer. Legal writers have put forth three theories, namely, that it is a contract of leasing, or one of bailment, or one of

a third unnamed species with characteristics of each of the other two; he chooses the first view after elaborately examining the arguments for each. This fundamental question settled, he minutely reviews the formation of this contract of lease, the mutual rights and duties of lessor and lessee, the effects of the contract as to third parties, its duration and the changes that may be caused by events. A well-analyzed table of contents and an index make the use of the little volume very easy, and there is a bibliography of English, French, German, and Italian works on the subject treated. W. C. G.

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- THE FIRST YEAR OF ROMAN LAW. By Fernand Bernard. Translated by Charles P. Sherman. New York: Oxford University Press, American Branch. 1906. pp. xiii, 326. 12mo.
- THE FOUNDATIONS OF LEGAL LIABILITY. A Presentation of the Theory and Development of the Common Law. By Thomas Atkins Street. In three volumes. Volume I, Theory and Principles of Tort; Volume II, History and Theory of English Contract Law; Volume III, Common Law Actions. Northport, N. Y.: Edward Thompson Company. 1906. pp. xxix, 500; xviii, 559; xi, 572. 8vo.
- MODERN BUSINESS CORPORATIONS, including the Organization and Management of Private Corporations, with Financial Principles and Practices, etc. By William Allen Wood. Forms of Procedure illustrative of the Formation, Organization, Operation and Consolidation of Corporations, written or selected by Louis B. Ewbank. Indianapolis: The Bobbs-Merrill Company. 1906. pp. xi, 358. 8vo.
- A DIGEST OF ENGLISH CIVIL LAW. By Edward Jenks, W. M. Geldart, R. W. Lee, W. S. Holdsworth, and J. C. Miles. In five books. Book II, Part I, by R. W. Lee. Boston: The Boston Book Company. 1906. pp. xxii, 85-158, (25). 8vo.
- STUDIES IN CONSTITUTIONAL LAW. DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION. By Lucius Polk McGehee. Northport, N. Y.: Edward Thompson Company. 1906. pp. x, 451. 8vo.
- THE GRAND JURY, Considered from an Historical, Political, and Legal Standpoint, and the Law and Practice Relating Thereto. By George J. Edwards, Jr. Philadelphia: George T. Bisel Company. 1906. pp. lxxix, 219. 8vo.
- THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XXI. For the year 1906. Borough Customs. Volume II. Edited for the Selden Society by Mary Bateson. London: Bernard Quaritch. 1906. pp. clxx, 242. 4to.
- PROCEEDINGS OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION, at its Second Annual Meeting, held at Baltimore, Md., December 26 to 29, 1905. Lancaster, Pa.: Wickersham Press. 1906. pp. 232. 8vo.
- REPORT OF THE TWENTY-EIGHTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, held at Narragansett Pier, Rhode Island, August 23, 24, and 25, 1905. Philadelphia: Dando Printing and Publishing Company. 1905. pp. 968. 8vo.
- REPORT OF THE COMMISSIONER OF EDUCATION for the year ending June 30, 1904. Volume II. Washington: Government Printing Office. 1906. pp. vii, 1177-2480. 8vo.
- ROMAN WATER LAW. Translated from the Pandects of Justinian by Eugene F. Ware. St. Paul: West Publishing Company. 1905. pp. 160. 8vo.
- AMERICAN PUBLIC PROBLEMS. Edited by Ralph Curtis Ringwalt. IMMIGRATION, and its Effects upon the United States. By Prescott F. Hall. New York: Henry Holt and Company. 1906. pp. xiii, 393. 8vo.

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VOLUNTARY ASSUMPTION OF RISK.¹

II.

IN one case only, in the absence of a statute imposing upon the master the duty of affording the servant some particular protection, could the servant, before the passage of the Employers' Liability Act of 1880, recover if he knew of the condition which the master's negligence had created. This was where the servant had complained to the master and had received a promise that the defect should be repaired. Cockburn, C. J., in *Clark v. Holmes*,² says: "The danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept. There is a sound distinction between the case of a servant knowingly entering upon a contract to work on defective machinery, and of one who, on a temporary defect arising, is induced by the master to continue to perform his service on a promise that the defect shall be remedied. In the latter case the servant by no means waives his right to hold the master responsible for any injury which may occur from the omission of the master to fulfil his obligation." And Byles, J., says: "The original contract was to work with fenced machinery, and it

¹ Continued from 20 HARV. L. REV. 34.

² 7 H. & N. 937. There was, in fact, a statute requiring the machinery to be fenced. Cockburn, C. J., however, thought it unimportant to determine "whether the duty exists by virtue of a statute or at common law." While Bowen, L. J., cites it as authority for the proposition that where a statutory duty exists, the plaintiff's mere knowledge of its violation is no bar to recovery, the case had been usually treated as authority only on the point stated in the text.

was his master and not he who violated the condition and in so doing exercised a species of compulsion over the servant." The duty of the master herein stated to take care to prevent the plant from deteriorating from the condition in which it obviously was at the time the servant entered into it was one well recognized in the earlier cases.¹

The case of *Clark v. Holmes* was therefore novel only in this, that it regarded the promise of repair as removing from the servant the bar to recovery which his knowledge would otherwise have presented. While this case has been followed with practical unanimity by all American jurisdictions, it was disregarded in Scotland in *Crichton v. Keir*,² where it was decided that a servant having been induced to continue in an employment by a promise of a young and efficient horse in the place of an old and inefficient one, could not recover for injuries received by continuing to work with the old horse, pending the performance of the master's promise. "A servant who in the face of manifest danger chooses to go on with his work, does so at his own risk and not at the risk of his master."³

On the whole the decision of the Scottish court would seem to be in absolute conformity with the spirit of the earlier English cases. It would seem to be impossible to distinguish on principle between the case where a servant with knowledge that the master had permitted the plant to get out of repair had continued to serve after complaint in fear of dismissal, and the case where he had been induced to continue serving because of a promise to repair. It is quite clear that the servant does not seek to recover upon the theory that the master's promise to repair amounts to a contract to do so, nor in *Clark v. Holmes* is the action founded upon the breach of such a contract. The same effect is given to a promise to repair whether made by the master himself, and therefore one which would bind him, or made by a subordinate who has no such authority; nor is it necessary that the promise has been made to the plaintiff himself if he actually knows that such promise has been made.⁴ The theory upon which the servant is debarred from recovery if he continues to work with obviously defective

¹ And it is stated by Lord Cranworth in *Bartonshill Co. v. Reid*, 3 Macq. H. L. Cas. 266, and is recognized by Kelly, C. B., in *Murphy v. Phillips*, 35 L. T. (N. S.) 477.

² McPh. 407.

³ Lord Justice Clark Inglis. This case was followed in *Frazer v. Hood*, 15 Rettie 158, and in *Wilson v. Boyle*, 17 Rettie 62.

⁴ 216 Ill. 624.

tools is that, he being free to remain or leave, his relation to the master is purely voluntary, and therefore one which he has no legal right to continue in. The master therefore can annex to its continuance, as he could to its creation, whatever conditions he pleases. The master's promise neither coerces him into remaining in the position nor deceives him as to the conditions under which the work is to be performed. He knows that the tool is dangerously defective. He is willing to work with it temporarily and until it can be repaired; but whether there is a promise of repair or not, he is fully cognizant of the risks of an existing defect, and is willing to undergo them rather than lose his place. The fact that the risk is temporary and not permanent may render his act more prudent, but it cannot make it any the less voluntary. It may be perhaps true that a servant may be willing to run a temporary risk rather than lose a permanent job, but in the end the inducing cause which leads him to accept the risk is the desire to retain his employment. The quantity of pressure therefore may be less, but the pressure is of the same sort, and is not one proceeding from the master, but from the servant's own necessities and desires. If, on the contrary, the contract of employment is regarded as giving the servant a right as against his master to remain in his employment, it would follow that even though the master did not promise to repair he should not be allowed to put the servant to the alternative of abandoning his right to serve, or running a risk therein due to the master's failure to perform his obligation. The case in reality represents a reaction against the rigor of the rule that a servant takes the risk of all known defects. The master has intended the servant to remain; that he offered inducements to do so shows that it was to his advantage; it would seem repugnant to natural justice to regard the servant as acting of his own independent volition and at his own risk because he yielded to the master's request. It would seem, therefore, that the conception of the court that the servant shall not thereby assume the risk incident to such action is, on the whole, just and fair, though perhaps not to be justified by any strict analysis of the principles applicable to this class of cases.

Save when such promise to repair was given, the servant's knowledge of the defect negated at common law the existence of any duty on the master's part in relation to it. So, in *Griffith v. St. Katharine's Docks*,¹ the action, though brought after the

¹ 13 Q. B. D. 259 (1884).

Employers' Liability Act of 1880, was not founded upon it. It was decided¹ that a declaration which failed to allege not merely that the master was negligent, but that the servant was ignorant of the danger thereby created, was fatally defective.

Upon the passage of the Employers' Liability Act of 1880² the question at once arose whether it had made the master liable to the workman for injuries received by reason of defective conditions in the machinery and plant which were known or obvious to the workman.³

¹ Brett, M. R., and Bowen and Fry, L.JJ., affirmed the decision of Day and A. L. Smith, JJ., in 12 Q. B. D. 493, Brett, M. R., saying that this was decided many years ago in *Priestly v. Fowler*. The same principle had been uniformly announced in the intervening cases; so in *Williams v. Clough*, 3 H. & N. 258, it was decided that the declaration must allege the ignorance of the servant of the defect which injured him, and that the declaration in question did sufficiently allege this by stating that the plaintiff, "believing the ladder to be in good condition and not knowing the contrary," used it and was hurt. Lord Bramwell differed to the extent of holding that the declaration should have shown that the plaintiff had no means of discovering the defect. It is clear, however, that while the servant may be bound to take notice of plainly inherent risks in obvious physical conditions, he is not bound to notice those defects which only an inspection would disclose. *R. R. Co. v. Swearingen*, 196 U. S. 551; *R. R. Co. v. McDade*, 191 U. S. 564. In *Vose v. R. R.*, 2 H. & N. 728, in the course of the argument (p. 732), the opinion of the court is plainly indicated that it must appear that the servant's ignorance of the defect is plainly alleged, or that the defect as described in the declaration must be one which indicates that the plaintiff could not have known of its condition, explaining *Roberts v. Smith*, 2 H. & N. 213, upon this ground. See also, to the same effect, *Bramwell, B., in Dynen v. Leach*, 26 L. J. Exch. 221.

² The sections material to the present discussion are: section 1, providing in substance that "where personal injury is caused to a workman; by reason of any defect in the ways, works, machinery, or plant (subsection 1) . . . the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman nor in the service of the employer"; subsection 5 and subsection 3 of section 2, "A workman shall not be entitled to compensation . . . where the workman knew of the defect . . . and failed within a reasonable time to give . . . information thereof to the employer . . . unless he knew that the employer . . . already knew of the said defect."

³ It would seem that the question of the servant's assumption of risk is about to be of great importance in the federal courts of the United States in consequence of the passage by Congress of the Act of June 11, 1906, Statutes of the 59th Congress, p. 232, which not only destroys the defense of fellow employment in suits by employees against railroads engaged in interstate commerce, but provides that the plaintiff's contributory negligence shall in all cases be left to the jury. However, since the servant's assumption of risk is recognized with practical unanimity as quite distinct from the defense of contributory negligence (*Day, J., Choctaw R. R. v. McDade*, 191 U. S. 64), it would appear that the servant may still be barred from recovery by knowledge, real or constructive, of the defective condition of the railroad's plant or premises to the same extent and in the same manner as before the passage of this act, which otherwise, but

In *Weblin v. Ballard*¹ A. L. Smith, L. J., held that the act put the workman when he sues the master under its conditions in the position of one of the public suing. The master shall have all the defenses which he would have had as against one of the public, but shall not have the several defenses he theretofore had when sued by a servant. He comes therefore to the conclusion that the defense of common employment when a fellow servant's negligence occasions the injury, and the defense that the servant had contracted to take on himself the known risks attendant upon the employment, being both in his opinion defenses peculiar to the relation of master and servant, are taken away by the act, and that the master "not having shown that the servant had used what was [to his knowledge] dangerous in a negligent manner," the latter was entitled to recover.

In *Thomas v. Quartermaine*² the plaintiff knew of the existence of the vat into which he fell, knew that it was unfenced and that his duties would require him from time to time to do work near it. On the occasion when he was injured, he went into its vicinity without orders and without complaint and attempted to remove a plank. In some way it stuck, and when it did give way he fell back with it into the vat. It was held that the plaintiff, though found by the jury not guilty of contributory negligence, could not recover, having entered and continued in the defendant's service with full knowledge of the conditions and the risks attendant thereon. Bowen, L. J., who delivered the principal opinion,³ while agreeing with Smith, L. J., that the act merely placed the servant substantially in the same position as one of the public, differs from him entirely as to the consequent effect. In his opinion the defense of common employment, being alone peculiar to the particular voluntary relation of master and servant, is alone destroyed by the act; that of the so-called assumption of risks is incident to any and all voluntary relations and so is untouched by it. It is in fact not, strictly speaking, a defense. The plaintiff fails, not because barred by his acquiescence in the defendant's breach of duty, but because the defendant owes to the plaintiff no duty save of full disclosure. The statute, he says, "merely gives the servant

for the in general high character of federal juries, would practically impose on the railroads the payment of a compulsory pension to injured employees.

¹ 17 Q. B. D. 122.

² 18 Q. B. D. 485.

³ Fry, L. J., agreeing with him; Brett, M. R., dissenting.

in regard to those matters to which it relates the same rights as if he were not a workman, and cannot, save by a violent distention of its terms, be strained into an enactment that the workman shall have the same rights as if he were a workman, and other rights in addition." In a word, the act, while relieving the servant from the disadvantages peculiar to this particular relation, does not impose upon the master any duties other than those due to persons who of their own free will come on his premises.¹

"The workman must still prove how he is on the defendant's property, and to do this he must show his license by the contract of employment.² The contract of employment shows to what class of licensee he belongs; not a bare licensee using for his own personal purposes the owner's property, but one invited to come for a purpose in which the owner, his master, has an interest as well as he, the servant; and the master's duty to him, while no less, can be no greater than to any other licensee for a similar purpose. At common law the occupier's duty to such licensees was merely to take care that the property should not contain any unusual or hidden and so unexpected or non-apparent defect. His duty was not to make the premises safe, but to make it as safe as it looked — to remove a hidden danger or make it known.³ If the physical condition and the danger incident thereto were obvious, it conveyed its own notice, but just as an actual notice must be capable of being understood by the class to whom it is addressed, so the physical conditions must be apparent and their dangerous nature appreciable, and the owner's duty varied with the apparent ability of the licensee to understand." An express notice written in English would be quite insufficient where only Italians were employed, and though

¹ So Lord Young, in *Morrison v. Baird & Co.*, 10 Rettie 271, says at p. 278: "The act does no more than remove a defense which was previously competent by providing that the employer against whom such action is raised shall not in certain circumstances specified in the statute be entitled to plead what the common law entitled him to plead, that he is not responsible to one employee for the fault of another.

² Field, J., in *Griffith v. Dudley*, 9 Q. B. D. 357.

³ He cites as authority *Kelley, C. B.*, in the Court of Exchequer Chamber, in *Indermaur v. Dames*, L. R. 2 C. P. 311: "Is he [the invitor] not bound to put a fence or safeguard around the hole, or if he does not, to give [the invitees] a reasonable notice that they must take care and avoid the danger." Willes, J., in the same case in the Common Pleas, L. R. 1 C. P. 274, p. 288, says: "a visitor . . . is entitled to expect that the occupier shall use reasonable care to prevent damage from unusual danger which he knows or ought to know"; and calls attention to the distinction made in *Wilkinson v. Fairrie*, 1 H. & C. 633, "between ordinary accidents and accidents from unusual, covert danger."

the open patent condition may be sufficient warning to an intelligent adult, any owner or master would realize that it could mean nothing to a child or an ignorant foreign peasant. So, says Bowen, L. J., "mere knowledge of the defect is not volition, there must be not merely knowledge of the physical condition of the premises, but appreciation of the risk involved therein,"¹ and he adds, "the risk must be voluntarily encountered." What does he mean by voluntarily? He says: "There may be facts which justify the inquiry whether the risk though known was really encountered voluntarily; the injured party may have a statutory right to protection, or again the plaintiff may have a common right or an individual right at law to find these particular premises free from danger. The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of the danger which but for a breach of duty on his own part would not exist at all." If there be a basis for the alleged duty other than the mere voluntary relation of master and servant, which, like that of licensor and licensee, creates no obligation save that of full and fair disclosure of actual conditions, — a basis, such as a statutory enactment or a common or individual right to find the premises safe, generally springing from the fact that the plaintiff's right to go on the premises is independent of the mere consent of the owner,²

¹ In *Yarmouth v. France*, 19 Q. B. D. 647, Lord Esher is astonished at this statement. So he says: "A dull man can recover damages when a man of intelligence cannot! Both knew of the danger, but one is imperfectly informed of its nature and extent!" No doubt it is unnecessary that the plaintiff shall be able to appreciate the precise extent of the danger or the gravity of the threatened injury (see *Feely v. Pearson Cordage Co.*, 161 Mass. 426). Nor does Lord Justice Bowen mean to say that it is necessary. Had Lord Esher said, "both knew the physical condition; one could and did appreciate that it entailed danger, the other neither could nor did," he would more accurately express Lord Justice Bowen's meaning. So stated, it is an absolutely accurate statement of the common law. Since *Grizzle v. Frost*, 3 F. & F. 622, it has been regarded as settled law that the master, if he chose to employ children, owed a duty to warn and instruct them as to dangers which, though obvious to the normal adult, they were from their youth and inexperience manifestly unable to appreciate. The same duty is of course due to those who through inexperience or manifest ignorance are palpably incompetent to appreciate the dangers inherent in obvious conditions. In America, where the decision of the majority of the court in *Yarmouth v. France* has met with practically no support, either in the construction of similar Employers' Liability Acts or in cases arising at common law, this distinction is everywhere recognized, and it is held that no risk is assumed unless the danger is such as to be obvious to that class of persons to which the servant belongs. See *Wagner v. Chemical Co.*, 147 Pa. St. 475; *Weiss v. Bethlehem Iron Co.*, 100 Fed. Rep. 45.

² See, for a classification of these rights and an analysis of their basis, p. 19, *ante*.

—then and only then can his encountering a known peril be considered as other than voluntary.¹

“But,” he says, “where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured party knowing and appreciating both risk and danger voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all.”

In the case of *Yarmouth v. France*² the facts showed that the plaintiff had been employed to drive horses in a mine; after he had been some time in the service, a vicious horse was supplied to him; he complained and was told to go on and use it. There was some evidence that the superintendent who told him to continue work had said that he would be protected, that his employer would be responsible if injury resulted. The majority of the court, Lord Esher, and Lindley, L. J., held that it was a question for the jury whether the plaintiff had freely and voluntarily assumed the risk of injury by continuing to work after making complaint. Fear of losing his job is regarded as a pressure destructive of the servant's freedom of choice, and the jury might consider the servant's complaint and the superintendent's assurance that the employer would be responsible not as a contract binding on the master and creating a liability, for the superintendent had no authority to make such a promise, but as bearing on the question as to whether the servant had intended to assume the risk. Lindley, L. J., considers that the act leaves the servant free to engage to incur a particular danger, and that he does so when he enters a business either in its nature or from the way it is conducted openly and inherently dangerous, but says: “In the cases mentioned in the act a workman who never engaged to encounter a particular danger but who finds himself exposed to it and complains of it, cannot, as a matter of law, be said to have impliedly agreed to incur it, or to have voluntarily incurred it because

¹ Even had there been a statutory duty to fence the vat, it would seem that if it is ever permissible under the English practice to withdraw a case from the jury because an affirmative defense has been conclusively established, the court might here hold that no jury could reasonably find that the plaintiff had acted in other than a purely voluntary way. There were no orders, no complaint; the servant did what he did, went where he went, of his own free choice. There appears to be an entire absence of evidence of any species of compulsion.

² 19 Q. B. D. 647.

he does not refuse to face it. If nothing more is proved than that the workman saw the danger, reported it, but on being told to go on, went on as before in order to avoid dismissal, a jury might properly infer . . . fear of dismissal rather than voluntary action.”¹

Lord Esher’s opinion is in effect based upon a construction of the act imposing on the master the duty under section one of providing a reasonably safe plant, including the system and rules of work, toward all workmen, not merely those who are ignorant of the true condition of affairs.²

The real point of difference between Bowen, L. J., and Lord Esher and Lindley, L. J., is in fact in one thing only. Bowen believed that there was no duty beyond that of full disclosure. Lord Esher and Lindley, L. J., believed that there was a duty to do more, — to take care to make the plant reasonably safe: Lord Esher holding that the act properly construed gives the right to such a duty; Lindley, L. J., that the servant has a right to have the plant kept up to the standard, which, so far as it was called to his attention, existed when the contract was formed. Once grant the duty and all agree³ that mere knowledge of its breach will not bar the plaintiff; a real consent to waive the wrongdoer’s liability must be shown, either express,⁴ in which case the question is one for the court as to whether such a consent is or is not contrary to the spirit of the act creating the duty, or implied from the circumstances, which is, save in an absolutely plain case, a question for the jury.

¹ Compare his statement in *Smith v. Baker* in the Court of Appeal, 5 L. T. 518.

² Lord Esher, M. R., seems to have completely misunderstood Bowen, L. J., whose opinion in *Thomas v. Quartermaine* he professes to follow. He seems to think that *Thomas v. Quartermaine* was decided on the ground that though the defendant had been guilty of a breach of duty the plaintiff’s conduct showed conclusively that he had of his own free will and with compulsion or fear of dismissal unnecessarily gone to meet the danger, — a question which he says should properly have gone to the jury. In fact, as has been seen, Lord Justice Bowen holds that the defendant is not liable because under no duty, in the absence of a statute expressly imposing it, to correct known and appreciated dangerous conditions, since the relation of master and servant is voluntary and not of right. The dissent of Lopes, L. J., in *Yarmouth v. France* is based upon this view of Lord Justice Bowen’s opinion and an acceptance of the law as there announced.

³ In *Thomas v. Quartermaine*, Bowen, L. J., says that if the plaintiff has a common or individual right to find the premises free from danger, “the defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with the knowledge of the danger which but for a breach of duty on his own part would not exist at all.”

⁴ As in *Griffith v. Earl of Dudley*, 9 Q. B. D. 357.

On the whole, taking into consideration the third subsection of section two of the act of 1880, that if the workman knew of the defect and "failed within a reasonable time to give . . . information thereof to his employer," he shall be disentitled to recover, it would seem that Lord Esher's construction is probably correct, and that Bowen, L. J., gave too limited an effect to the provision in supposing that Parliament had only meant it to apply to the cases where, the servant having given notice of a defect, the master had promised to remedy it, or where some particular precaution had by statute been laid upon the master,¹ and so gave too narrow a construction to the act. It would seem that the act was designed to protect the workman from the pressure of his necessities — to equalize his economic inferiority — by which, as experience had shown, he had been prevented from procuring stipulations in his contract of employment adequately protecting him from dangers, from which he could not guard himself while the master could guard him, and to do for him as a class what the Railway and Canal Act of 1834 had done for shippers of goods. To remove therefore one only of the disadvantageous legal incidents to the so-called voluntary relation into which his wants must needs whether or no force him, would be to ignore the real intent of the act and to defeat rather than effectuate the result which Parliament apparently designed to accomplish.

Lord Lindley arrives at the master's duty in another way. His position is practically that of Lord Cockburn and Byles, J., in *Clark v. Holmes*,² that it is the master's duty to take care that the condition of service shall not change for the worse. He distinguishes sharply between dangers which exist when the employment begins and those which come into existence afterwards. The first the servant accepts if he knows of them, the latter not unless he voluntarily and freely consents to incur them.³ This position would seem to be logically sound, whatever view may be taken of the

¹ These were the only cases to which the subsection could apply, according to his construction of the act, for these were the only cases in which he considered that the master owed any duty to a servant who knew of a defect. The other cases given are cases which fall outside the relation of master and servant, and are cases where the plaintiff, apart from the voluntary consent of the defendant, has a right to be upon the premises or use the appliances, and so is entitled of right to find them safe.

² 7 H. & N. 937.

³ He does not intimate under which head he would place conditions actually existing when the service begins but the danger of which is not appreciated until the servant has been at work for some time.

true basis of the master's freedom from liability for injuries resulting from known dangers.¹

If the true basis be that it is presumed to be an implied term of the contract of service that the servant assumes the risk of the conditions under which he knows he must work, such assumption is the creature of a contractual intent, though one fictitious and presumed to exist in spite of the absence of any evidence of actual consent, and contractual intent must be ascertained as of the time of entering into the contract and in the light of then known conditions, not of after discovered facts. What policy of the law can demand the imposition upon a relation, already sufficiently unequal, of a presumed intention to assume the risk of any danger which the master in breach of his admitted moral obligations and of the implied terms of his contract² may see fit to create in the future?

If, on the contrary, the basis of the servant's liability to recover for injury resulting from a known danger is, as it probably is, that to a relation voluntarily created or continued no duty adheres to either party save that of fair disclosure of the conditions under which it is to be formed or continued, it would seem that if there is not a mere service from day to day but a binding contract for a definite term formed in ignorance of any danger, the servant has, by virtue of the contract, what Bowen, L. J., calls "an individual right to be upon the premises," and to find them as safe as they were originally,³ and if the master puts him to an election between foregoing such right and incurring a risk, his choice of the latter should not be regarded as voluntary. None the less the effect of the decided cases is strongly opposed to Lord Lindley's distinction,

¹ In *Davis v. Forbes*, 171 Mass. 548, Knowlton, J. in a dissenting opinion takes much the same position as Lindley, L. J. He distinguishes between dangers of which the servant is or should be aware when he enters the service and those which supervene afterwards. He says: "The master by his contract impliedly agrees to furnish safe appliances. . . . There is no new contract nor any new consideration for a contract when the plaintiff obeyed the order to use the defective appliance. The rights and obligations created by the contract of hiring remained unchanged."

² The theory which regards the assumption of risk as an implied term in the contract of service regards the master's duties as to the condition of his plant in the same light — a breach of these duties is a breach of his contract, and the servant may leave and sue as for wrongful dismissal.

³ Lord Bramwell admits (*Smith v. Baker*, [1891] A. C. 346) that in such a case to allow the premises to deteriorate is the breach of an implied term of the contract of service which entitles the servant to leave, and bring suit for damages as for wrongful dismissal. See also *Devens, J., Leary v. R. R.*, 139 Mass. 580, *accord*.

unless there is complaint and a promise to repair.¹ It may well be that the common law conception of contractual obligations and rights has been so tinged by their procedural development that the right so created was regarded as at best a mere right of action for damages for the loss of the benefit expected, unless some definite, well-recognized common law relation, such as that of landlord and tenant, was created; and even then the right adhered to the relation and was not the creature of the contract creating the relation. At common law there was no right to such benefits at all; the procedural development went along the lines of a right of action on the case in the nature of deceit to recover for damage suffered by reliance on a false promise, instead of treating contracts as being, like covenants, grants of the benefit intended and so conferring a right to receive it. Equity, by specifically granting specific performance of certain contracts, gave to rights thereunder a semblance of property. But at common law none of the summary remedies which the law deemed appropriate for the assertion of rights inherent to citizenship or the ownership of property was available to enforce the right to merely contractual benefits.

A citizen whose inherent rights were invaded could justify force or the undergoing of a known risk to assert them. One who was denied a contractual benefit could not seize upon it; it may well be that neither can he justify incurring risk to obtain it. He has bargained for a benefit; he has, by the grace and through the ingenuity of the court, been given a novel action for damages for its loss. So much the law would give, but no more. He had no right to the thing bargained for. Such being the original attitude of the common law, where equity refuse to grant specific performance, as in all save extraordinary contracts of employment (and then only to the master), it is natural that courts should say, as Lord Bramwell² and Devens, J.,³ in effect said, "if a new danger is created let the servant leave the employment and sue for the breach of his contract if he has one." This attitude, however, in view of the universal recognition⁴ that contracts of service do confer rights with

¹ From *Priestly v. Fowler* (1837) to *Williams v. Manchester*, [1899] 2 Q. B. 638, the fact that the defect arose subsequent to the engagement has been considered of no moment. See also *Lamson v. Co.*, 177 Mass. 145; *Bajus v. R. R.*, 103 N. Y. 312, and *Labatt, Master & Servant*, §§ 283, 384.

² *Siner v. R. R. and Smith v. Baker*.

³ *Leary v. R. R.*, 139 Mass. 580.

⁴ Beginning with *Lumley v. Gye*, 2 E. & B. 216 (1853), and *Bowen v. Hall*, 6 Q. B. D. 333 (1881).

which third parties may not interfere, seems ultra-conservative, in fact, reactionary.

The case of *Smith v. Baker*,¹ while it is taken to have finally settled the law in accordance with the decision of the majority in *Yarmouth v. France*, adds little that is new. In that case the plaintiff was injured while working in a railroad cutting by a fall of a stone from a derrick. It was not shown that the derrick was in bad order. He knew that it was the practice to jib stones from the cutting without giving any warning to the servants, they being expected to work while the stones were passing overhead. He had complained to his fellow workmen of the danger incident to this mode of doing the work. In the County Court the jury had found that the defendant was guilty of negligence. The Divisional Court and the Court of Appeal both found that there was no evidence of negligence.²

The question was brought up to the House of Lords in such shape that the majority of the court considered that they were debarred by the County Court Act of 1888 from considering the question of the defendant's negligence, and that they were confined to the effect of the plaintiff's continuance in the service after he knew that no warning could be expected of the jibbing of stones over his head as barring him from recovery.

While the question of the physical insufficiency of the defendant's plant was closed to investigation by the verdict of the jury, it by no means follows that the defendant's negligence in the sense of his breach of a duty owed to the plaintiff in relation thereto was not open to discussion. As Bowen, L. J., pointed out in *Thomas v. Quartermaine* (an opinion quoted with approval by all the judges), the plaintiff's knowledge of the danger goes to the denial of any duty owing to him by his master. The question of the defendant's negligence would appear therefore to depend upon the servant's knowledge of the danger, unless the court held that either at common law or under a proper construction of the statute the

¹ [1891] A. C. 325.

² In the Court of Appeal Lord Justice Coleridge said that the plaintiff had engaged to perform dangerous work and having taken the risk could not recover. "There never was a doubt of that doctrine before the Employers' Liability Act, nor had there been a doubt since. The supposed difficulties which arose from the decision in *Yarmouth v. France* where the workman was not engaged to perform dangerous work, are not in question now." Lord Lindley said: "The plaintiff in *Yarmouth v. France* was employed to drive a cart, and a vicious horse was put upon him and he complained. He was not employed to break or drive vicious horses."

master owed to his servant a duty to protect him from patent as well as latent dangers.

While there is only one dissenting opinion, there is an extraordinary divergence in the reasons given by the various law lords. Two (Lords Halsbury and Herschell) hold that at common law it is the master's duty to establish a safe and proper system for using even perfectly sound machinery, and that in regard to a breach of this duty the servant's knowledge of the defective system does not bar recovery. Unless there is some peculiarity about this particular duty distinguishing it from all other duties owed by the master, and none is pointed out, the unanimous trend of English authority before the Employer's Liability Act is against this position. The sole authority for it is a Scotch Court of Sessions case¹ cited with approval by Lord Cranworth in a dictum in a Scotch appeal to the House of Lords.²

¹ *Sword v. Cameron*, 1 Sc. Sess. Cas. (N. S.) 493.

² *Bartonshill Colliery Co. v. Reid*, 3 Macq. H. L. Cas. 266, at p. 300. What Lord Cranworth was addressing himself to was to show that, notwithstanding the opinion of the Lord Justice Clark Hope in *Dixon v. Rankin*, 14 Dunlop 420, the doctrine of common employment had no place in the law of Scotland, and that "no clear settled course of decision in Scotland imposed on the House of Lords the necessity of holding the law of that country to be different from the law of England" on that point. Now, in *Sword v. Cameron* the plaintiff had been injured by a fellow servant, Duff, exploding a blast before he had reached a place of safety. It was shown to be customary to allow an insufficient time between the warning and explosion. Of this and presumably of the attendant danger the plaintiff was fully aware. To prove his point Lord Cranworth says that the decision in favor of the plaintiff can be justified on the ground that the injury resulted not from the mere personal neglect of Duff, the fellow servant, but from the fact that he was acting in obedience to a system defective in not adequately protecting the workman at the time of explosion. Now, in *Sword v. Cameron* Lord Mackenzie laid particular stress on the fact that Duff knew of the plaintiff's proximity when he fired the blast. The case was actually decided on Duff's almost wanton negligence and the master's responsibility therefor. In addition he says that even if the pursuer "had walked up to the blast and sat upon it, it could scarcely be pleaded that Duff should have fired the shot so that if the pursuer wished to be blown up he should be indulged." In such a case it could scarcely be said that any system of blasting would make the master answerable for such a wilful wrong of a servant; even the servant's personal liability would depend on nice questions of the limits of lawful consent. See *Bell v. Hansley*, 3 Jones (N. C.) 131; *Reg. v. Coney*, 15 Cox C. C. 46, per Hawkins, J., and *Com. v. Colberg*, 119 Mass. 351. But the whole opinion shows a paternal attitude on the part of the Scotch law probably derived from its origin in the civil law,—a taking by the courts upon themselves the power to judicially supervise the manner in which such businesses should be conducted, so as to protect the servants from injury quite irrespective of the servant's knowledge of the danger or consent to encounter it,—an attitude which, whether economically sound or not, is the very reverse of the individualistic tendency of the English law. In *Bartonshill Colliery Co. v. Reid* the injury was caused solely by an engineer's negligent

Lord Watson, while apparently concurring in this view, attached more weight to the effect of the Employers' Liability Act, in this respect adopting the construction which Lord Esher put upon the act in *Yarmouth v. France*. Lord Halsbury, in addition to his reliance upon the case of *Sword v. Cameron*, seems to be of the opinion that the plaintiff must have consented to the particular thing done; he says, "the plaintiff in this case did not consent to the particular stone being slung over his head. His position was such that he could not look out for himself and could not know when stones were being slung. The defendants must go to the extent of saying that wherever a person goes where there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. The maxim applies equally to a stranger, and if applicable to this extent, no person ought ever to have been awarded damages for being run over in London streets, for no one (at all events before the admirable police regulations of late years) could have crossed London streets without knowing that there was a risk of being run over."¹ He fails, however, to notice this distinction, every person has a common right to cross streets, the servant has only the right to be in the master's employment by the consent of the master. The distinction which he draws between a danger which the plaintiff knows his own action will on the particular occasion bring upon him, and those dangers which are involved in the general conditions of the work in which he consented to engage, appears to indicate that, in his opinion at least, there is no acceptance of the general risks of the bad condition of the plant involved in the mere continuance of work with such defect. It is difficult to say precisely what sort of consent to undergo a particular known danger will bar in Lord Halsbury's opinion the servant's recovery. If he had known that stones were being slung over his head and had stayed at work because he did not wish to take the trouble to move, clearly his act would have been in every sense voluntary; if, on the contrary, the workmen were not allowed to leave their work to

mismanagement of a perfectly sound elevator totally unknown to the plaintiff, and not to any obvious defect in either system or machinery. No question was raised of the effect of the servant's knowledge as a bar to his recovery. It is indeed strange to find that Lord Cranworth, by distorting a Scotch case so as to bring the Scotch law into conformity with that of England, should be thought to have furnished authority for subordinating the English law to that of Scotland.

¹ This is practically the same illustration given by Mellish, L. J., in *Woodley v. R. R.*, L. R. 2 Exch. 384.

seek safety (and most probably the warning was omitted to prevent just such interruptions), he would, had he known of the slinging of the stone, have still been reduced to the alternative of facing the risk or losing his position. As Lord Herschell points out, "if the inevitable consequences of the employee discharging his duty is obviously to occasion him personal injury, it may be . . . if he continued to perform his duty" and is injured, he could not maintain an action. Here, however, is more than a mere voluntary subjection to a risk; it would be a subjection to an imminent peril which no prudent man would face, — it would be that earliest form of contributory negligence, a casting of oneself upon a certain danger in the unreasonable insistence upon one's extreme rights.¹

Lord Bramwell in his dissenting opinion stoutly upholds his conception of voluntary action. If the muscles are left free to respond to the will, if no overpowering force be exerted, he can conceive of no pressure of external conditions upon the will sufficient to destroy volition.²

It will be noticed that while the defective system was in existence when the plaintiff was employed, there is no evidence that he learned of it until afterwards. In fact such defects would normally come to the attention of the servant only after he had entered upon his employment. While the case therefore does not necessarily involve more than is included in the opinion of Lord Lindley in *Yarmouth v. France*, that the servant, by continuing in an employment with knowledge that the conditions existing therein when engaged have been changed, does not accept the risk thereof by not throwing up his job, it is accepted, in *Williams v. Birmingham Co.*,³ as authority for the proposition that mere knowledge of the

¹ See *Cruden v. Feltham*, 2 Esp. 685, and *Clay v. Wood*, 5 Esp. 44, n. 2, p. 17, *supra*.

² Lord Morris, while agreeing with the majority of the court, bases his decision upon the fact that the verdict of the jury established that the machinery was defective (and this is evidently the correct interpretation of the verdict, for apparently the question of the defendant's negligence in failing to give a proper warning was first raised in the House of Lords), and therefore, while the plaintiff knew that no warning was to be given, he did not know that the machinery was defective. While he thus assumed the danger of working without warning, he did not assume the unknown risk of an injury resulting from the fall of a stone due to the defective machinery. He adheres, however, to Lord Justice Bowen's statement that, both at common law and under the act, "where the injured party, appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of commission or omission, no evidence of negligence."

³ [1899] 2 Q. B. 638.

risk does not necessarily involve consent to undertake it in a case where there was a patent dangerous defect in the company's plant at the time of employment. In England, therefore, today it may be taken as settled law that mere knowledge of a dangerous defect in the plant or system of work, whether existing at the time of employment or supervening thereafter, does not debar the servant from recovery. He may waive the protection of the Employers' Liability Act by expressed consent¹ or by a consent to waive it implied from the circumstances, but such consent cannot be presumed from his mere continuance in the employment. It is always a question for the jury whether his conduct has expressed a free and voluntary consent to waive his right to protection.

In Massachusetts this question has received extended consideration. In *Fitzgerald v. Paper Co.*² it was decided that a servant assumes all the risks of which she knows and appreciates when she enters the master's service, attended upon the conditions under which he conducts it. But the court seems to adopt Lord Halsbury's distinction between voluntarily encountering a particular risk upon a particular occasion, and the acceptance of an indefinite future risk which might or might not arise out of the conditions known to the servant. In this case the plaintiff slipped upon stairs which were covered with ice and snow. The plaintiff knew that ice must form from time to time on the steps from the steam emitted by the defendant's operations. She knew that there was ice upon them when she went down them. It was held that, as it was not certain that she appreciated that the steps though known to be slippery were on this occasion dangerously so, she was not barred from recovery. In addition, Knowlton, J., said that it was important to consider that she had no way of leaving the mill save by going down the steps. It would seem, however, that among the risks which she assumed by entering the defendant's employment was the risk that from time to time her egress from the mill would be rendered dangerous by the collection of ice upon the steps; and therefore that the exigency alluded to was itself one of the dangers to which the known conditions of her employment subjected her. The court recognized that exigencies might exist which would justify a voluntary exposure to a known risk, as where the defendant had wrongfully exposed the plaintiff to a danger which he was unwillingly forced to encounter. The cases cited in

¹ *Griffith v. Dudley*, 9 Q. B. D. 357.

² 155 Mass. 155.

support of this are all cases in which the plaintiff had a common or individual right at law to find the premises or appliances free from danger, or where he encountered the danger in the performance of a legal or social duty.¹

The case of *Fitzgerald v. Co.* was one brought at common law. It was intimated in *Boyle v. R. R.*² that were the plaintiff to bring his action under the Massachusetts Employers' Liability Act, an act substantially similar to the English Act of 1880, it would be arguable that he did not assume the risk if he continued in the employment through fear of losing his place, unless the jury found him to be culpably negligent. In *O'Maley v. R. R. Co.*³ it was, however, decided that even though the action were brought under this act, a servant who remained in the employment with knowledge of the danger, though induced to do so through fear of losing his position, assumed all the risks, where the defect was one existing at the time that the servant entered the employment. The court intimated that it was open to discussion whether continuance with like knowledge of supervening defects would bar him. However, in the case of *Lamson v. Co.*⁴ this question was finally determined in favor of the employer. The plaintiff was injured by a hatchet falling from a rack. He had been in the defendant's employment for many years. About a year before the accident new and unsafe racks had been put in in place of racks which were quite secure. The plaintiff complained to the superintendent that the hatchets were more likely to drop than when the old racks were in use. He was told that he would have to use the racks or leave. Chief Justice Holmes said: "The plaintiff on his own evidence appreciated the danger more than any one else. He perfectly understood what was likely to happen. That likelihood did not depend upon the doing of some negligent act by people in another branch of the employment, but solely on the permanent condition of the racks and their surroundings, and the plaintiff's continuing to work where

¹ See *ante*, p. 19. *Pomeroy v. Westfield*, 154 Mass. 462, and *Gilbert v. Boston*, 139 Mass. 313, were cases of defects in the highway over which the plaintiff had a common right as a citizen to pass, created by the neglect of the municipality to keep it in good repair. The cases of *Thomas v. Co.*, 100 Mass. 156, *Mahoney v. R. R.*, 104 Mass. 73, and *Dewire v. Bailey*, 131 Mass. 169, were cases of obstruction to such highway caused by the defendant's wrong. *Looney v. McClain*, 129 Mass. 33, was a case of the wife of a tenant of a flat injured through the landlord's non-repair of the approaches thereto, and *Eckert v. R. R.*, 43 N. Y. 502, was a case where the plaintiff had exposed himself in order to save a life imperilled by the defendant's negligence.

² 151 Mass. 103.

³ 158 Mass. 133.

⁴ 177 Mass. 145.

he did. He complained, and was notified that he could go if he would not face the chance. He stayed and took the risk."¹ Now, here it is to be noted that the injury did not result from the plaintiff's doing any particular thing which brought him into immediate contact with the racks. It was due to what Lord Herschell calls a risk which might never eventuate in injury and which did not require any action on his part to make it injurious. Were it not for Chief Justice Holmes' statement that "the likelihood of the accident did not depend upon the doing of some negligent act by people in another branch of employment," it would seem clearly that Lord Halsbury's distinction between a general and a particular risk had been repudiated.²

¹ See, however, *Wells & French Co. v. Kapaczynski*, 218 Ill. 149, which would seem to intimate that where a command is given to perform certain work involving the use of obviously dangerous machines, the servant does not assume the risk, though he is not misled by the order through trusting to his foreman's superior knowledge, nor is so peremptorily ordered that he had no opportunity to weigh the consequences, his obedience being deliberate and with full knowledge of perfectly open and obviously dangerous defects in the machines. *Scott & Hand, J.J.*, and *Cartwright, C. J.*, dissented. "Under the circumstances," said *Scott, J.*, "the order presented to him the same alternative which he had under the law, and he must therefore be regarded as having deliberately elected to incur a known risk rather than leave the employment of his master."

² It is doubtful if this dictum means more than this, that where the defect was such that it could only become effective for injury by some future misconduct of a fellow servant, the plant, though known to be physically imperfect, cannot be said to be known to be dangerous, since the plaintiff is not bound to anticipate any misconduct of his fellow workmen. Now of course by the Act of 1887 the defense of common employment has ceased to avail the master whose plant, though originally good, has become unsafe through the carelessness of a fellow servant. The servant only accepts the risk of injuries probable from the normal use of the defective plant or appliance in question, but not such further risks as may be added thereafter by the subsequent negligence of other servants. The master therefore would probably be liable if a mere defect ordinarily harmless was made not merely dangerous, but actually injurious by the negligence of a fellow servant. The fact that the servants are in different departments is important only in this, that the servant cannot be expected to learn of misuse of the defective tool, whereas, if they are working together, he probably knows not merely that the tool is physically defective, but also that on the occasion in question it has been, or on other occasions habitually is, misused. So that the defect, though ordinarily harmless, is in fact known at the time to be actually a source of danger or likely at any time to become so. It seems impossible that Mr. Justice Holmes intended to intimate that employment in the same or a different branch of employment would be of any further importance, and that the act excluded from its operation those workmen who were immediately associated with one another; in a word that the act was intended merely to introduce the doctrine repudiated as a whole in *Farwell v. Boston*, that as to certain conditions of service the servant accepted the risk of the negligent conduct of those workmen who worked in the same immediate department and in close association with him, and of no others.

In New York, in *Laning v. R. R.*,¹ Folger, J., regarded the whole question as one of contributory negligence, and held that the plaintiff's knowledge of the intoxicated condition of a fellow servant was a fact for the jury and merely cast upon the plaintiff a higher degree of care. But in *Gibson v. R. R.*² it was held that a conductor who was struck and killed by the projecting roof of a depot building was barred from recovery by his knowledge of its character. He took service subject to the risks incident to the position and mode of construction of the depot, and if the defendant did nothing after the employment to aggravate the danger, there was no liability. In *Sweeney v. Envelope Co.*³ it was held by Danforth, J., that a servant accepts a service subject to the risks of the use of such machinery as is then in use therein. The defendant if he chose might carry on the business with an old rather than a new machine, and could not be required to keep in his employ a servant who would not run it. Threats of dismissal if the servant will not work at the machine are therefore not coercion. He distinguishes sharply between the permanent character and plan of the plant, as to which the owner must be allowed the fullest freedom of choice, and failure to maintain in good repair such premises and appliances as the owner may choose to use. However, in *Bajus v. R. R.*,⁴ while Danforth, J., still maintained his previous opinion, substantially that of *Lindley, L. J.*, in *Yarmouth v. France*, the majority of the court held that there was no difference between supplying an originally defective appliance and allowing a good one to fall into disrepair, and that a servant who knew of either condition, though supervening since his employment, assumed the risk thereof.

This attitude, substantially that of the Massachusetts courts, had been adopted by practically all American jurisdictions.⁵ In North Carolina alone⁶ is *Smith v. Baker* followed. In Alabama, *Holborn v. R. R.*,⁷ a case brought under an Employers' Liability clause of the code of that state, in which it was decided that mere continuance after knowledge of the defect did not bar the plaintiff from recovery unless he had failed to notify his employer, was

¹ 49 N. Y. 521.

² 63 N. Y. 449.

³ 101 N. Y. 520.

⁴ 103 N. Y. 312.

⁵ See, for an admirable collection of cases, *Labatt, Master and Servant*, chaps. xvii and xx.

⁶ See *Lloyd v. Hanes*, 126 N. C. 359.

⁷ 84 Ala. 138.

overruled by *Railroad v. Allen*,¹ on the authority of *Thomas v. Quartermaine* (the court apparently not having seen the later case of *Smith v. Baker* decided the preceding year). In the Supreme Court of the United States no case has been decided where there has been both a knowledge of the defect and a complaint of it, but the general tendency of authority is in favor of the position taken by the Massachusetts court. However, in *Railroad v. Archibald*,² White, J., says: "Where an employee receives for use a defective appliance, and with knowledge of the defect continues to use it *without notice to his employer*,³ he cannot recover for an injury from the defective appliance thus voluntarily and negligently used."

Upon one point there has been considerable difference of opinion in the American authorities. Where the statute has imposed upon a master the duty of taking some particular precaution to protect his servant, it has been decided, in *Baddeley v. Lord Granville*,⁴ that the servant, by continuing in the employment with the knowledge that the statutory protection was not afforded, did not thereby consent to its breach. As was said by Lord Bramwell, the most ardent champion of the strict application of the maxim *volenti non fit injuria*, in the case of *Britton v. Great Western Cotton Co.*:⁵ "In such case the plaintiff is not placed in the dilemma which arose when the action is for breach of a duty at common law; that dilemma is this, either the danger was obvious or it was not. If obvious, the servant must have known it as well as the employer (he would thereby be barred by the maxim); if it was not obvious, there was no negligence in the employer. Here the duty is statutory. If the deceased dispensed with the performance of it, knowing the duty and knowing the danger, I think he would be *volens*, but not otherwise." Whether the servant, even, knowing of the statute creating the duty, can expressly agree to dispense with its performance, would seem to depend upon whether a penalty has been imposed upon its breach. Such a penalty would indicate that the statute was not intended to confer a merely personal privilege and benefit upon the servant which he could if he chose waive by express agreement to do so, but was designed to impose a rule of conduct in which the state has an interest and the breach of which it regards as an offense against itself. The very purpose

¹ 99 Ala. 374 (1892).

² The italics are the writer's.

⁵ L. R. 7 Exch. 130; 41 L. J. Exch. 99.

³ 170 U. S. 665.

⁴ 19 Q. B. D. 423.

of imposing the penalty is to enable the state to enforce by penal action compliance with the statute; the servant's economic inferiority and dependence preventing his right of suit from being an efficient guarantee of its enforcement. In *Griffith v. Dudley*¹ it had been held that a servant may by express contract waive the benefit of the Employers' Liability Act. That act, however, was intended merely to remove from the servant certain disabilities under which at common law he labored, and he might therefore if he please consent to waive its benefit. In *Kinsley v. Pratt*² it was held that an employee by entering a factory in which the owner had failed to furnish the protection prescribed by the Factory Acts of 1886, assumed the risk of such lack of protection if she knew that no protection was in fact given.³

In *Narramore v. R. R. Co.*,⁴ Taft, J., holds that mere knowledge on the part of the employee that the company is violating the statute, and his continuance in the service thereafter without complaint, does not amount to an assumption of the risk such as will bar recovery. He says the only ground for passing such a statute "is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by a positive law because he had not previously shown himself capable of protecting himself by contract, and it would entirely defeat this purpose to permit the servant to contract the master out of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute." He was of the opinion therefore that even an express consent to waive the performance of the act would be invalid, the statute being imposed for the protection of the servant and in the interest of the public, and enforceable by criminal prosecution. *A fortiori*, no waiver will be implied from mere continuance in service with knowledge of its breach.⁵

¹ 9 Q. B. D. 357.

² 148 N. Y. 372.

³ The case was decided largely on the authority of *O'Maley v. Gas Light Co.*, 158 Mass. 135, a case decided not under an act providing for specific precautions and imposing a penalty for their violation, but under the Massachusetts Employers' Liability Act.

⁴ 37 C. C. A. 499.

⁵ Compare the language used by Wills, J., in *Baddeley v. Granville*: "As to the result of past breaches of the obligation, people may come to what agreements they like, but not as to future breaches, of which there ought to be no encouragement given to the making of an agreement between A and B, that B shall be at liberty to break the law which has been passed for the protection of A."

The argument of Taft, J., would seem to expose conclusively the fallacy of the position taken by Bartlett, J., in *Knisley v. Pratt*, that "while the statute contemplates the protection of a certain class of laborers it does not deprive them of their free agency and the right to manage their own affairs." As he says, it is because their economic inferiority deprives them of freedom to contract that the legislature deems it wise to interfere for their protection. Such economic inferiority would equally force them to contract to exempt the master, just as it prevented them from contracting to force the master to secure them protection.¹

However, as Taft, J., points out, a servant may be debarred from recovering for injury received from the breach of a statutory duty on his master's part by his own contributory negligence. A servant who continues to work, knowing that a statutory protection has been omitted, while he does not waive the liability for the violation of the statute, is bound to use care commensurate with the added risk to avoid the injurious consequences of such a breach of the statute.²

In many cases the plaintiff, who was not in the defendant's employment, but who was working on the defendant's premises in the performance of his employment with another, either an independent contractor with such defendant, as in *Woodley v. R. R.*,³ *Stevens v. Gas Co.*,⁴ *Wagner v. Elevated R. R.*,⁵ or *Membery v. R. R.*,⁶ or a shipper of goods, as in *Miner v. R. R.*,⁷ or a railroad company which had trackage rights over the defendant's lines, as in *Wood v. Lock*,⁸ has been held to be barred by his knowledge of the danger from recovering for injuries received from the dangerously defective condition of the premises. At first glance it would seem that the servant did not encounter the risk voluntarily, but was forced to do so in the performance of a duty which he owed to his master; and that he had a right, under the recent decisions in trade and labor cases, to work for his master, with which the defendant could not directly or indirectly interfere, by persuading his master to discharge him, or by rendering the service so dangerous that he would be forced

¹ See *Monteith v. Kokomoko Co.*, 159 Ind. 149, following *Narramore v. Co.* and the cases cited in the latter case.

² Such are the cases of *McCarthy v. Foster*, 156 Mass. 511, *Keenan v. Electric Light Co.*, 159 Mass. 376, *Krause v. R. R.*, 53 Oh. St. 43, *Schlemmer v. R. R.*, 207 Pa. St. 198, often cited as supporting the decision of *Knisley v. Pratt*, *supra*.

³ L. R. 2 Exch. 384.

⁴ 73 N. H. 159.

⁵ 188 Mass. 437 (1905).

⁶ 14 App. Cas. 179.

⁷ 153 Mass. 398.

⁸ 147 Mass. 604.

to abandon it. And that therefore the relation between the defendant and plaintiff was not one which was wholly voluntary on either side, or which the plaintiff could be said to have freely entered into. However, it is to be noted that the plaintiff's right upon the premises is dependent upon his employer's relation to the defendant, as in *Bowe v. Hunking*.¹ If his employer should choose to engage to do work upon a building patently defective,² or if he should choose to contract to do repair or construction work upon a railway, as in *Woodley v. Ry.*, while the ordinary operations of the line were going on, the defendant would owe no duty to such employer save not to enhance the open and manifest dangers of the job by some additional fault of omission or commission. So the servant of a railroad which leases rights over tracks patently defective has no right to expect that the lessor line shall afford him better protection than it does to its own servants. His employing company has entered into an agreement whereby its business shall be conducted upon the defendant's tracks under like conditions as the defendant conducts its own traffic. So much but no more could the plaintiff's employer have asked; so much and no more can the plaintiff himself ask. The defendant's duty to him is no greater than the duty to his employer. In *Miner v. R. R.*, however, the question is somewhat more difficult. In that case the plaintiff's employer was a shipper. He was sent to obtain from the railway goods which had been consigned to his employer. His employer, and so he, had the right therefore to find the premises safe for the unloading of goods, and so, had there been merely some defect creating a slight danger in the approaches, it would seem that the plaintiff's employer would have had the right to encounter it in order to obtain his goods, and so that the plaintiff might equally encounter it without assuming the risk thereto. However, the facts show that the defendant's only negligence was in affording the plaintiff a place to unload the car, which was dangerous by reason of its proximity to the rails, whereby the plaintiff's horse was frightened. And it appeared that the plaintiff might, at the cost of some personal inconvenience and trouble, have caused the car to be shifted to a point at which it might have been safely unloaded. If he chose to encounter the risk rather than undergo a slight inconvenience and take a little trouble, it cannot be said that he

¹ 135 Mass. 380.

² As, had the defect been open and notorious, would have been the case of *Stevens v. Gas Co.*

was reduced to the alternative of foregoing his right to receive the goods or to run the risk in question.¹

Thus it has been seen that while in England the pressure of the servant's necessities has finally come to be regarded as destructive of his free will when placed in a position where he must either encounter some probable though not imminently threatening danger, or else give up his employment, the American cases stoutly deny it any such effect. It may well be that the different economic conditions of the two countries may account for this. In England work has become, especially during the development of the present position of English courts on this point, increasingly difficult to obtain. The loss to a workman of his job is a very real misfortune, the fear of losing it a very pressing species of compulsion. On the other hand, in America as yet there is normally no dearth of work for competent workmen. If one job is dangerous, another can probably be found. Add to this the known tendency of American workmen to take desperate chances touching their safety, and it may well be that in the vast majority of cases any real pressure arising from fear of loss of employment is practically non-existent; and the risk is encountered through mere thoughtless recklessness or disinclination to leave a position in other respects satisfactory. That which in England effectually coerces and controls the will may well have no such effect in America.

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¹ So in *McCarthy v. Foster*, 156 Mass. 511, the plaintiff was the servant of a tenant, and was using an elevator which the landlord was bound to keep in repair. It would seem therefore that under the authority of *Looney v. McClain*, 129 Mass. 33, his master would have been entitled to find the elevator in good order, and would have had the right to use it though slightly dangerous, and the plaintiff in the right of his master would equally have been entitled to have encountered a slight risk rather than forego such a use. See *Shoninger Co. v. Mann*, 3 L. R. A. (N. S.) 1097 (Ill., 1906), *accord*. However, the evidence showed that the plaintiff had, by his own conduct in piling merchandise against the slats of the elevator, added to the risk. His injury therefore was due to his own contributory and negligent act in increasing the risk which arose from the obviously defective condition of the elevator.

EXECUTIVE JUDGMENTS AND EXECUTIVE LEGISLATION.

THE questions, How far are the decisions of executive officers conclusive? and, To what extent and in what cases are such decisions reviewable by the courts? are, under our system of government, of great importance, and problems involving their consideration are constantly presenting themselves for solution.

No one who has made any study of these questions can have failed to be impressed with the unsatisfactory character of the decisions of the courts relating thereto. The difficulty appears to be largely due to improvident attempts on the part of the courts to formulate in the cases actually before them a rule or rules which shall not only dispose of the case at bar in a satisfactory manner, but also serve as a guide for the disposal of future cases. These attempts have been so unsuccessful that one is surprised that they are still so lightly entered upon.

Ex-Secretary Olney has lately¹ directed attention to "the indeterminate and confusing" attitude of the United States Supreme Court on the point whether prescribing rates for railroads engaged in national commerce is a legislative function which cannot be delegated by Congress to a commission. The same characterization of the attitude of that court on the conclusiveness of executive decisions might with equal propriety be made.

For instance, in *Miller v. Raum*,² we find the rule stated,

"that the courts will not interfere with the executive officers of the government in the execution of their ordinary official duties even when those duties require an interpretation of the law, inasmuch as no appellate power is given them for this purpose."

In *Oil Co. v. Hitchcock*,³ we find this statement :

"the Secretary, having the duty of seeing that the law is carried out, has jurisdiction to decide its meaning, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction."

¹ N. Am. Rev., Oct., 1905.

² 135 U. S. 200.

³ 190 U. S. 316.

It would seem from these decisions that an attempt to overthrow a department ruling, however erroneous, as to the rights of parties under the laws, the execution of which had been entrusted to the department, was hopeless; and while this may be the result in practice, the court in the next case, *Bates v. Paine*,¹ though upholding the department's ruling, was unwilling to do so on the theory of its conclusiveness above stated, and promulgated a new rule, namely:

"That when the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, though they may have the power and will occasionally exercise the right of so doing."

It was necessary in *Bates v. Paine* to abandon the rule of the conclusiveness of the department's decision on matters of law formulated in the preceding cases, inasmuch as the particular decision which was before the court was a reversal of that which had governed the practice of the department on the same matter, and the rights of the parties dealing with it, during the preceding sixteen years. To have held both contradictory rulings conclusive was evidently a greater task than the court was willing to assume.

How long the rule in *Bates v. Paine* will remain unmodified is of course pure matter of conjecture. As regards questions of mixed law and fact, it would seem to be sufficiently vague to permit the court to interfere or not at its discretion, and is of course valueless in enabling one to determine when decisions of executive officers on such questions are subject to review by the courts. As regards questions of fact, the rule is explicit enough and may cause embarrassment in the future in the case of some peculiarly erroneous finding of fact; but the extent to which the Supreme Court of the United States is prepared to go in upholding legislation which makes the liberty of the citizen dependent on the decision of facts by an executive officer, from which decision there is no appeal to the court (which may be seen from the *Ju Toy* case),² is, to say the least, not indicative of an inclination to overthrow executive decisions of fact.

The Supreme Court of Massachusetts, too, has had its troubles in dealing with these perplexing questions, and as a recent decision

¹ 194 U. S. 104.

² 198 U. S. 253.

of that court¹ seems to have introduced a somewhat novel method of solving these difficulties, involving, too, a constitutional question which appears not to have received from the court the attention it merited, a short statement of that case and the rules enunciated by the opinion therein may be appropriate.

In order to appreciate the decision in *Commonwealth v. Sisson*, a brief review of some of the previous cases is necessary.

In *Ela v. Smith*,² for the purpose of deciding that the Mayor of Boston was not liable to an action for having unnecessarily issued an order calling out the military to prevent a mob or riot, his determination of the question whether such mob or riot was threatened was called *judicial*, the court holding that the statute clearly conferred on the mayor "a judicial power," and laying down this rule at p. 136:

"Whenever the law vests in an officer or magistrate a right of judgment, and gives him a discretion to determine the facts on which that judgment is to be based, he necessarily exercises within the limits of his jurisdiction a judicial authority."

Here we have two things decided:

1. That an executive officer, the Mayor of Boston, may lawfully have judicial power conferred on him and may exercise judicial authority, and that while acting within the fair scope of this authority, he is clothed with all the rights and immunities which appertain to judicial tribunals.

2. That, while possessing all the immunities of judicial tribunals, he is subject to none of the limitations of those tribunals, but exercises his judicial functions without notice or hearing, and subject to no appeal.

The question whether the court properly construed the statute is beside the point. It may or it may not have been the intention of the legislature to confer on the mayor just such powers and immunities as the court found were conferred, nor need we now stop to question the power of the legislature to do this.

The point is simply that the court holds that judicial power may lawfully be conferred on an executive officer, and that, as the term "judicial power" is used in this case, it appears to be as a synonym for absolute or arbitrary power, — power the corrupt or negligent exercise of which subjects the holder to no liability,

¹ *Commonwealth v. Sisson*, 189 Mass. 247.

² 5 Gray (Mass.) 121.

and the correctness of whose exercise cannot be reviewed in any court.

It was however shortly perceived that the use of the term "judicial" as descriptive of a power of that character was somewhat inappropriate, and in a later case we find the term softened to "quasi-judicial." In *Salem v. Eastern R. R. Co.*¹ the court says:

"There are many cases in which powers of determination and action of a quasi-judicial character are given to officers entrusted with duties of local or municipal administration by which not only the property, but the lives of individuals, may be affected, and which from their nature must be exercised finally and conclusively without a hearing or even notice to the parties who may be affected."

And the case of *Ela v. Smith* is cited as an instance of the exercise of such a power.

It is not easy to perceive that the matter is much aided by the introduction of the qualifying word *quasi*. The final determination of a matter without notice to or hearing of those adversely affected by the judgment, and on evidence not under oath or even without any evidence, and on the tribunal's own motion has nothing judicial in its character.

The conclusion reached in *Salem v. Eastern R. R.*, that the action of a local board of health in passing without notice an order for abatement of a particular nuisance was quasi-judicial, and that its finding that such a nuisance existed was conclusive for certain purposes, is reached by premising that it "stands upon similar ground" to general regulations prescribed by such boards, to whose validity "no previous notice to parties to be affected by them is necessary."

It would seem clear that in the opinion of the court the power under which such general regulations were passed was also quasi-judicial.

And this is expressly stated by the court in its opinion in the case of *Belcher v. Farrar*,² wherein it is stated that the power vested in boards of health to forbid by general regulations the exercise within their respective towns of any trade which is a nuisance, etc. "is in its nature quasi-judicial"; as

"its exercise necessarily involves the determination of the question whether a particular trade falls within the category contemplated by the legislature

¹ 98 Mass. 431, 443.

² 8 Allen (Mass.) 325.

in the enactment before cited, and requires the officers charged with the duty to use their discretion and judgment in adjudicating on the subject-matter. This is the decisive test that the authority vested in them is judicial and not ministerial merely."

Here we have the test carefully stated. It applies equally well to general and to special regulations,—to those which cover all cases of a certain class as well as to those which simply determine a particular case,—and its evident purpose is to distinguish from purely ministerial functions those wherein a discretion is vested in the executive official or board. If such a discretion exists, that is, if the executive official or board is charged with the duty of acting when a certain state of affairs exists, its power of determining whether or not that state of affairs exists is judicial or quasi-judicial, and, strangely enough, that determination is held to be conclusive, though made without notice or hearing and subject to no appeal.

In *Nelson v. State Board of Health*¹ a distinction is made between the two classes of regulations, the general and special, both of which are, by the decision in *Belcher v. Farrar*, placed on the same ground; and the first class, namely, the general regulations, are stated to be "quasi-legislative," while only as to those made regarding a particular case is the term "quasi-judicial" retained. To these latter only was it held that the appeal to the jury given by the act under consideration applied. This would seem, aside from the constitutional question to be later referred to, to be rather a felicitous distinction.

The use of the term "legislative" is adopted for the general measure applicable to all as a new rule of conduct, and as to which the arbitrary methods of legislative bodies, absence of notice, hearing, or appeal might be deemed suitable, while to the decision of the single case, with its notice, hearing, and right of appeal to a jury, the term "judicial" or "quasi-judicial" might well apply. It is simply to be noted, however, that this is a complete reversal of the meaning of the term "judicial" or "quasi-judicial" as used in the earlier cases. It then meant what the term "legislative" is now used to describe.

But let us accept the change as an improvement and see what have been its results.

In *Commonwealth v. Sisson* the statute provided that:

¹ 186 Mass. 330, 333.

"If the [Fish and Game] commissioners determine that the fish of any brook or stream in this commonwealth are of sufficient value to warrant the prohibition or regulation of the discharge therein of sawdust from saw mills, and that the discharge of sawdust from any particular saw mill materially injures such fish, they shall, by an order in writing to the owner or tenant of such saw mill, prohibit or regulate the discharge of sawdust therefrom into such brook or stream."

Under this authority the commissioners made an order reciting that they had determined that the fish in the Konkapot River were of sufficient value to warrant the prohibition of the discharge of sawdust into it, and that the discharge of sawdust from the defendants' mill into said brook materially injured the fish therein, and prohibited them from continuing such discharge. The defendants being prosecuted for failure to comply with the order, contended *inter alia* that the acts whereby the commissioners determined, (a) that the value of fish in any brook was sufficient to warrant prohibiting the discharge of sawdust therein, and (b) that the discharge of sawdust from any particular mill materially injured the fish in such brook, were judicial acts, and valid only when made under judicial forms, that is, prior notice, hearing and taking of sworn evidence, none of which forms had the commissioners complied with in this case.

The court did not dispute the defendants' contention that all this followed if the order was judicial, but in order to avoid those unpleasant consequences held that the commissioners' order, though a special one and one made to apply to the defendants only, was *legislative*, and hence valid without notice or hearing, as in legislative proceedings there is no right to either of these. This is not only emphasizing the complete reversal of the doctrine of *Ela v. Smith* and *Salem v. Eastern R. R.*, where the terms "judicial" and "quasi-judicial" were employed to designate executive orders of this description, but is a decided extension of the meaning of the term "legislative" beyond that given by *Nelson v. State Board of Health*.

Another feature of the difficulty created by the opinion in the *Sisson* case is this. On p. 254 we find this rule:

" . . . on the one hand, when the law is general and the question is whether under it the defendants are committing a nuisance, the facts are determined by judicial action. On the other hand, the determination of the same facts is legislative, in case the legislature decides to make the thing a nuisance *per se*. And when it is legislative, it is final, and no hearing is necessary."

Under this rule, if a board of health, under its general power to abate nuisances, had determined that a nuisance consisting of a pile of decaying fish existed on defendants' premises, and had made the decision without notice to or hearing the defendants, the lawfulness of the act of the board in abating this nuisance might be questioned in an action against it by the defendants. The contrary was determined in *Salem v. Eastern R. R.*

On the other hand, if the legislature determines to make the presence of a pile of decaying fish a nuisance, and the board finds that such a pile existed on defendants' land, he cannot dispute the correctness of the finding of the board, because it is legislative.

The contrary rule was laid down in *Miller v. Horton*,¹ where Holmes, J., in delivering the opinion of the court, says at p. 546:

"Within limits, it [the legislature] may thus enlarge or diminish the number of things to be deemed nuisances by the law, and courts cannot inquire why it includes certain property, and whether the motive was to avoid an investigation. But wherever it draws the line, an owner has the right to a hearing on the question whether his property falls within it, and this right is not destroyed by the fact that the line might have been drawn so differently as unquestionably to include that property. But if the property is admitted to fall within the line, there is nothing to try, provided the line drawn is a valid one under the police power."

Very likely the court in the *Sisson* case did not intend to lay down anything contrary to the rule in *Miller v. Horton*. There was nothing in the case to require the determination of any such point. The correctness of the findings of fact by the commissioners was not disputed, and the intent of the legislature to make those findings conclusive clearly appears. The case presented simply the question of the constitutional power of the legislature to enact such a law, and in view of the fact that the court was of the opinion that the act prohibited (the discharge of sawdust into the brook) was one which the defendants had no legal right to perform except so long as the legislature refrained from prohibiting it, that question would not appear to have been a difficult one.

The objection to the opinion is that in disposing of a comparatively simple case, it unnecessarily promulgates a novel rule on a

¹ 152 Mass. 540.

point of administrative law, and a rule open to grave constitutional objections which have apparently received no consideration from the court; and that it has introduced an element of serious uncertainty into a problem which the rules laid down in the cases of *Miller v. Horton*¹ and *Stone v. Heath*² had done much to render clear.

There remains to be noted the question of constitutional law above referred to. If the powers conferred on the Fish and Game Commissioners were either legislative or judicial, their exercise by an executive board would seem to be expressly prohibited by the Constitution of Massachusetts, Bill of Rights, Art. XXX. :

"In the government of this commonwealth . . . the executive [department] shall never exercise the legislative and judicial powers or either of them. . . to the end it may be a government of laws and not of men."

No mention is made in *Commonwealth v. Sisson* of this constitutional objection to vesting legislative powers in an executive board, unless it be the brief statement that "the right of the legislature to delegate some legislative functions to state boards was considered by this court in *Brodline v. Revere*."³

This, of course, was not meant as a statement that the right of the legislature to delegate legislative power to the Fish and Game Commissioners was established by the decision in *Brodline v. Revere*, and, in fact, the guarded expressions of that decision fall far short of establishing any such doctrine. The point decided in *Brodline v. Revere* was that a regulation of the Board of Metropolitan Park Commissioners limiting the use of parkways was valid, but the court is extremely careful to refrain from deciding that the statute authorizing the park commissioners to make "rules and regulations for the government and use of the roadways or boulevards under its care" was a delegation of legislative power to that board, and to suggest⁴ that the statute simply leaves to the board the administration of details which the legislature cannot well determine for itself.

Indeed the court suggests⁵ that some of the statutes authorizing boards of health to make rules and regulations for the preservation of the public health, which it has been customary to regard as necessary exceptions to the rule above stated, and justified on the principle of local self-government may also be

¹ *Supra*.

² 179 Mass. 385.

³ 182 Mass. 578.

⁴ P. 602.

⁵ P. 601.

"justified constitutionally on the ground that the work of the board of health is only a determination of details in the nature of administration, which may be by a board appointed for that purpose, and that the substantive legislation is that part of the statute which prescribes a penalty for the disobedience of the rules which they make as agents performing executive and administrative duties."

In other words that the making of even general regulations under statutory authority is an executive and not a legislative function.

This principle, borrowed perhaps from the law of France, to which country we are also indebted for our theory of the separation of the powers of government, would seem to be well established in the jurisprudence of the federal courts interpreting the Constitution of the United States, and its adoption by that of Massachusetts, as suggested by the opinion in *Brodline v. Revere*, would certainly tend to avoid needless conflict between legislation and the constitution.

Among the federal decisions see the case of *In re Kollock*,¹ where a regulation prescribing under the provisions of a revenue act the stamps, makes, and brands to be used on packages of oleomargarine, is said to have been made

"merely in the discharge of an administrative function, and falls within the numerous instances of regulations, needful to the operation of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer."

Even more closely in point, as showing that under the rule as laid down by the Supreme Court of the United States the acts of the Fish and Game Commissioners in the *Sisson* case were not the exercise of legislative power, are the cases of *Field v. Clark*² and *Buttfield v. Stranahan*.³

In *Field v. Clark* the question was whether an act of Congress permitting the free importation of certain articles, but providing that this privilege should be suspended as to any country producing such articles if the President deemed that such country imposed unreasonable exactions and duties on the products of the United States, was unconstitutional as delegating legislative power to the President.

The court, after laying down the principle that Congress cannot under the Constitution delegate legislative power to the President,

¹ 165 U. S. 526.

² 143 U. S. 649.

³ 192 U. S. 470.

held that the act in question was not objectionable as attempting such delegation.

"Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law."¹

And the language of the Supreme Court of Pennsylvania in *Moers v. Reading*² is quoted:

"Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law."

To the same effect is *Buttfield v. Stranahan*, where the law prohibited the importation of tea inferior in quality to the standards which should be fixed by the Secretary of the Treasury, and the court held that the conferring of that power on the Secretary to complete the law by determining the standards was not delegating legislative power to him.

And it is to be noted that the acts of the President and of the Secretary of the Treasury had this characteristic of legislative proceedings which was lacking in the acts of the commissioners in the *Sisson* case, namely, that they were acts of general application affecting all persons alike.

In fact nothing is gained and much is lost by applying the terms "legislative" and "judicial" to the act whereby an executive official or board determines that on the facts presented to or ascertained by him or by it, action should be taken for the enforcement of any law. Nor does the fact that the law may expressly leave such determination to the judgment of the official, as in the *Sisson* case, change the essential character of his act.

The disadvantage of such use of the term "legislative" as is made in the opinion in the *Sisson* case may be summarized as follows. If the term is correctly employed, and if the acts of the commissioners were really legislative, as the court seems to hold, the statute under which they acted apparently violated the express prohibition of the constitution of the state, unless it could be

¹ P. 693.

² 21 Pa. St. 188, 202.

shown to come within some recognized exception to the rule established by the constitution. One asks at once, Why was not the statute void? The opinion affords no answer to this query. The result is that a subject which calls for careful treatment has been needlessly confused.¹

Edmund M. Parker.

BOSTON.

¹ Since the decision in *Commonwealth v. Sisson* an act (Chap. 356 of the Acts of 1906) has been passed — it is understood on the petition of the Messrs. Sisson — requiring the commissioners before making an order forbidding the discharge of sawdust into any stream to give notice thereof and a hearing thereon, and giving to any person aggrieved by such order a right of appeal to the Superior Court sitting in equity.

Since the passage of this act the functions of the commissioners in making such orders have probably ceased to be "legislative." *Quare*, have they become "judicial," now that such orders may only be made after notice and hearing?

THE POWER OF CONGRESS TO PRESCRIBE RAILROAD RATES.

IT is well known that a constitutional objection lies against at least one fundamental principle upon which the new railroad rate law has been constructed. That principle is embodied in the clause providing that the Interstate Commerce Commission may determine and prescribe just and reasonable rates to be observed as the maximum to be charged, which the railroad company shall not exceed. This, so to speak, is the crux of the law. A brief space may not unprofitably be occupied in an effort to ascertain, if we may, the true sources of this power to fix rates which apparently has been almost universally assumed to exist in Congress.

The familiar language of the commerce clause of the Constitution is as follows:

"The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

This power to regulate, as Chief Justice Marshall has said, is "to prescribe the rule by which commerce is to be governed." The reason why this clause was put into the Constitution was in order that citizens of the different states should enjoy free commercial intercourse throughout the Union. Bearing this in mind, we have something to guide us in determining what meaning ought to be given to the term "regulate commerce." Whatever may tend to harass, impede, or prohibit commercial intercourse is to be enjoined.

Congress has exclusive and plenary power to legislate in every direction and upon all subjects wherein this governing principle is concerned. The mode of facilitating commerce is wholly within the authority of Congress to determine. Whether it be a wagon over a highway, a boat along a canal, or a freight car over a railroad, the underlying principle remains the same. Whatsoever the federal legislature in its wisdom shall deem necessary and requisite in order to maintain a perfect freedom of commercial intercourse between the states, it has the power and authority to deal with and apply through such provisions of law as it shall from time to time

see fit to enact. New conditions arise; new instruments of commerce come into use; but the purpose and object of the grant of power from the sovereign state to the United States does not change. The power may be extended to a larger range of objects, but its limits as to essential meaning remain the same.

It has been argued with no little force that, inasmuch as the words "commerce with foreign nations" and "among the several states" are embraced in the same clause, a like construction should be given to each kind of commerce. So far as the power to prescribe the mode or method of carrying on the business is concerned, the argument is unquestionably sound. Freedom to every citizen of a state to prosecute a commerce, foreign or interstate, unrestricted by hostile state legislation or interference, is guaranteed by this clause of the Constitution.

Keeping in view this simple principle, we ask ourselves the question: is prescribing the rate that a ship charterer or a railroad manager shall charge for carrying a ton of freight a regulating of commerce, within the meaning of this provision of the Constitution? Power to regulate does not necessarily imply that the price may be regulated at which the carrier shall transport goods. The behavior of the carrier may be a fit subject of legislation. If he demand an extortionate price for his services, he *pro tanto* impedes free commercial intercourse. Nobody presumes to deny that Congress may forbid extortion, and visit the practice of it with fine or imprisonment.

Extortion may be classed with the giving of rebates. In fact, Congress may take measures to guard against any and all practices that deprive shippers of their right to commercial intercourse between the same points upon equal terms with every other shipper. There is, however, an obvious distinction between regulating commerce in this manner in order to prevent wrongdoing and the fixing of a scale of rates for the daily conduct of business. That the rate fixed by a traffic manager may prove to be unreasonable, and thus in a remote way impede or restrict the freedom of commercial intercourse of shippers along the line of the road, is not a circumstance from which can be deduced the conclusion that the states have surrendered to Congress the power to prescribe interstate rates, even conceding that the states themselves had once possessed it. In other words, if the price asked by the carrier be merely unreasonable in amount, so that, however annoying to shippers, it cannot fairly be said to impede them to the

extent of preventing that freedom of commercial intercourse which parties are entitled to enjoy, there is no ground, it would seem, for Congress to interfere.

A state may authorize a municipality to regulate within its limits the sale of firearms or spirituous liquor. Such legislation confers no right upon the city authorities to compel a dealer to charge for a gun or for a glass of liquor such price only as they may have decided upon. Plainly it is not necessary, in order to accomplish the purpose for which the state has passed the statute, that the municipal officials meddle with the right of the storekeeper to sell his goods at such prices as he can obtain. That the citizen may be protected in his right to carry on unrestricted commerce, it surely seems not needful that the legislature prescribe what price he may obtain for commodities of which he is free to dispose. The right of a common carrier likewise to fix his own price for services belongs to him subject to having such portion as may be unreasonable recovered from him by a suit at common law. From time immemorial fixing such prices has been left to the carrier himself by bargain with the shipper.¹

For years the railroads of this country had arranged their own rates for freight and passengers, except possibly in one or two instances where the charter had prescribed the rate. Had this question as to the right of Congress to prescribe rates been raised forty years ago, everybody would have answered it in the negative. Upon principle, looking at the situation as governed by the logical meaning of the grant to Congress, as it must have been in the minds of the framers of the Constitution, we are constrained to say that no such power has been given to Congress under this clause of the Constitution.

A word now as to the power of a state to prescribe railroad rates. It will be remembered that thirty years or more ago the legislatures of Illinois, Iowa, Wisconsin, and Minnesota enacted certain legislation in restraint of railroad companies. People were dissatisfied with the rates charged for passengers and freight. Public feeling ran very high. Four or five cases of large importance came up to the Supreme Court, and were decided in 1876. The points involved were argued by lawyers of the highest reputation. Until this Granger movement began, probably no one had ever

¹ There is a class of transactions where the carrier enjoys a special privilege and is licensed to pursue his calling. Here the state very properly fixes the tariff.

dreamed that the legislature would interfere and take out of the hands of a railroad the right to fix a charge for performing the duties of a carrier.¹ So unheard of was the claim set up by the friends of this drastic legislation that one of the counsel was led to free his mind as follows:

"It cannot be seriously intended that the nature of the business gives the state any right to fix the carrier's compensation. I am not aware that it has ever been attempted in any civilized state, save in the peculiar legislation which has afflicted a few of the states in the northwest for the past two or three years."

Notwithstanding the formidable array of counsel, and the very searching extent of their arguments, the Supreme Court announced a conclusion far reaching in effect and radically departing from what had been theretofore considered the law. Chief Justice Waite delivered the opinion, which was concurred in by all the justices, except Field and Strong. The doctrine laid down is comprised in the following extract:

"When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by that public for the common good to the extent of the interest he has thus created."²

This case was that of an elevator in Chicago, which the owner contended was private property. Railroad cases decided at the same time were subjected to the test of the same doctrine, and the constitutionality of the legislation was sustained.

A little later a similar question came before the New York

¹ The late B. R. Curtis had given an opinion upon the legislation of Iowa and Wisconsin. An extract from his opinion was laid before the court, from which we quote as follows:

"We do not believe that it is within the power of any legislature in the United States to compel owners of property or persons, natural or political, to part with their property, or render other personal service at their own expense and risk to the public for prices fixed by the legislature. . . . A railroad corporation when carrying on the business of a common carrier, at its expense and risk, and for its own profit, cannot be distinguished from any other common carrier; its duties, its liabilities, and its rights are the same, whether they transact the business over a road which they own, or which they hire, or which nature has made for them in the shape of a navigable river, or which the public has built at its expense and thrown open for the common use; and unless it can be successfully maintained that the legislature may, by what is in truth a legislative decree, establish for the future prices for personal services and expenditures and risks incurred in rendering it, I am unable to see how this law can be brought within the field of legislation."

² *Munn v. Illinois*, 94 U. S. 126.

Court of Appeals, in the case of Budd, the owner of a private elevator. Judge Peckham (now a Justice of the Supreme Court) said of the former decision :

"I think that, notwithstanding the great respect which is entertained for the federal Supreme Court, the doctrines of the Munn case have never received the unqualified approval of the profession."¹

Later, in 1891, Justices Brewer, Field, and Brown repudiated the doctrine of the Munn case, the dissenting opinion being written by Brewer :²

"I dissent from the opinion and judgment in these cases. The main proposition upon which they rest is, in my judgment, radically unsound. It is the doctrine of *Munn v. Illinois* reaffirmed."

Ten years after the decision in *Munn v. Illinois*, Mr. Justice Miller reminded the profession that at that date but three members of the court remained who concurred in the opinion.³ He tells us that the main question in all the cases argued was the right of the state to establish any limitation upon the power of the railroad companies to fix the prices at which they would carry passengers or freight.

"It was strenuously denied, and very confidently by all the railroad companies, that any legislative body whatever had the right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state within which a railroad company did business to regulate or limit the amount of any of these traffic charges."⁴

The power of a state to interfere and fix the charges for freight and passengers of a railroad company that it has chartered may be considered as no longer open to question.

What bearing does this view of the right of a state over railroads have upon the inquiry, does Congress possess the power to prescribe rates? That it recognizes an enlarged control over the management of railroad corporations is apparent. As established law, it tends to create in the mind a belief that for the protection of the public the railroad in respect to its charges needs to be under the close and constant guardianship of the sovereign. Those

¹ 117 U. S. 50.

² 143 U. S. 548.

³ Waite, C. J., Miller and Bradley, JJ.

⁴ *Wabash, etc., R. R. Co. v. Illinois*, 118 U. S. 569 (1886).

who advocate the possession by Congress of the same power that a state exercises argue, if we understand it, somewhat as follows.¹

The state has the right to regulate rates, because the railroad is devoted to a public use. The state may not legislate with regard to the shipment of freight from within its limits to a point outside the state. The power of Congress over interstate commerce is exclusive, and even though Congress has not legislated on the subject, the state has no right to deal with so much of the carriage as passes over a railroad within its own borders. Such is the decision in the *Wabash* case.² Now a state has surrendered to the United States all its sovereignty as to interstate commerce. So has the adjoining state. Combine these two acts of surrender, and the United States becomes possessed of the right that each state respectively might once have exercised.

There is something plausible in this ingenious contention. The theory, subtle though it be, answers well enough in respect to power that the state as a sovereignty unquestionably possesses over the carriage of passengers of goods within its borders. Where such carriage forms part of an interstate transaction, we may conceive of the state, so far as its own territory is concerned, as having parted with the right of control that it once enjoyed. No state had power to regulate commerce upon the highway of an adjoining state. Authority ended at the state line. Hence no power of an interstate character can have passed from a state to the United States, upon the adoption of the Constitution.

What took place was an abandonment by the state of the right (which up to that time had been freely exercised) of regulating such commerce upon its highways as was destined to pass out of the state into the territory of its neighbor. The adjoining state, in respect to its own highways, enjoyed a similar right. Out of these two distinct rights you cannot, by combining them, create a third right. In other words, the power "to regulate commerce among the states" was brought into being by the Constitution. It had no previous existence. The character of this new-born power is to be ascertained, and its extent measured, only by consulting the object and purpose of its creation. The states have ceased any longer to exercise a control that interferes with the complete and paramount right of the federal government.

¹ Whether a different rule applies to a state which has been formed from territory once belonging to the United States, is not here considered.

² 118 U. S. 569.

Because the commerce clause of the Constitution deprives a state of the right to fix taxes for the railroad carriage of an interstate shipment across its territory (or through a part of it), it by no means follows that Congress takes unto itself that privilege of which the Constitution has deprived the state. The truth is that there is no actual need that a power to prescribe rates for interstate commerce should be lodged anywhere outside of the railroad corporation itself. The doctrine of the *Munn* case, as has already been observed, may engender an idea that the public for their protection need the aid of a supervising political authority over the prices of railroad transportation, alike within a state and across its borders. Reflection, however, will convince students of the railroad problem that no such necessity exists in respect to interstate commerce business. Let the inequalities of service be corrected, and rates will take care of themselves.

Should the question of the power of Congress to prescribe rates be brought squarely before the Supreme Court of the United States for decision, an opportunity will be afforded for reviewing the doctrine of *Munn v. Illinois*, in the light of valuable experience gained since that decision was first announced. At that time the issue was confined to the validity of certain novel legislation in three or four northwestern states. The reasoning advanced by a majority of the justices in that notable opinion will be of only persuasive force when the court shall find itself compelled to pass upon the constitutionality of the power of Congress to prescribe rates for interstate commerce transportation.

Frank W. Hackett.

WASHINGTON, D. C.

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THE LAW SCHOOL. — The registration in the School on November 15 for the last twelve years is shown in the following table : —

	1895-6	1896-7	1897-8	1898-9	1899-1900	1900-01
Res. Grad. . . .	—	—	1	1	—	1
Third year . . .	96	93	130	102	134	144
Second year . . .	138	179	157	169	193	202
First year . . .	224	169	216	218	232	241
Specials	9	31	41	58	51	58
	<u>467</u>	<u>472</u>	<u>545</u>	<u>548</u>	<u>610</u>	<u>646</u>
	1901-02	1902-03	1903-04	1904-05	1905-06	1906-07
Res. Grad. . . .	1	—	4	1	1	—
Third year . . .	149	167	180	182	192	190
Second year . . .	190	196	201	232	216	199
First year . . .	229	228	293	285	243	243
Specials	59	49	60	58	64	62
	<u>628</u>	<u>640</u>	<u>738</u>	<u>758</u>	<u>716</u>	<u>694</u>

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts : —

Class of	HARVARD GRADUATES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1898	42	1	25	68
1899	45	6	19	70
1900	50	11	30	91
1901	45	3	28	76
1902	59	2	28	89
1903	43	4	28	75
1904	47	5	17	69
1905	44	4	20	68
1906	52	7	32	91
1907	44	6	40	90
1908	39	5	27	71
1909	30	6	29	65

GRADUATES OF OTHER COLLEGES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1898	19	23	62	104
1899	21	12	45	78
1900	30	19	60	109
1901	27	22	59	108
1902	22	29	61	112
1903	23	26	83	132
1904	25	29	74	128
1905	23	27	78	128
1906	30	45	92	167
1907	32	33	89	154
1908	19	33	96	148
1909	30	24	98	152

HOLDING NO DEGREE.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	Total of Class.
1898	25	2	25	52	224
1899	11	2	8	21	169
1900	11	2	3	16	216
1901	25	—	9	34	218
1902	18	4	9	31	232
1903	21	1	12	34	241
1904	22	—	10	32	229
1905	12	2	18	32	228
1906	25	1	9	35	293
1907	18	5	18	41	285
1908	14	1	9	24	243
1909	11	3	12	26	243

As the twenty-six Harvard seniors in the first year class have in each instance completed the work required for the Harvard A. B. degree, all members of the class are virtually college graduates. The same is true of practically the entire School. Of the sixty-two special students, thirty-five have entered this year, and of these twenty-six are graduates of a college or university, six having received a degree in law.

One hundred and twenty-two colleges and universities have representatives now in the School, as compared with one hundred and eighteen last year and one hundred and fourteen the previous year. In the first year class sixty-six colleges and universities, as compared with sixty-four last year, are represented, as follows: Harvard, 65; Yale, 16; Princeton, 15; Brown, 13; Dartmouth, 9; Amherst, 8; Bowdoin, 7; Tufts, Williams, 4; Alabama, Notre Dame, Ohio State, 3; Bucknell, California, Central, DePauw, Hamilton, Hiram, Holy Cross, Illinois College, University of Illinois, Indiana, Kentucky State College, Stanford, Mt. Allison, Nebraska, Vermont, 2; Acadia, Baker, Bates, Beloit, Brooklyn Polytechnic, Chicago, Colgate, Denison, Dickinson, Fordham, Furman, Georgetown, Gustavus Adolphus, Iowa State College, Kansas, Kentucky, Marietta, Massachusetts Institute of Technology, Middlebury, Minnesota, Missouri, Mt. Union, North Carolina, Oberlin, Pomona, Rochester, Rutgers, South Carolina, Swarthmore, Syracuse, Trinity (Ct.), Wabash, Wake Forest, Washington, Wesleyan (Ct.), Western Maryland, Western Reserve, William Jewell, Wisconsin, 1. There are at present in the School eleven law school graduates, four of whom hold academic degrees also, representing the law schools of the following universities: Alabama, George Washington, Illinois, Iowa, Maryland, Michigan, Missouri, Texas, Tulane, West Virginia.

LEGAL EFFECT OF ATTEMPTS TO SEVER EASEMENTS FROM THE DOMINANT TENEMENTS. — That an easement cannot exist severed from its dominant tenement, is now well settled.¹ Consequently, when the owner attempts to grant the easement to a stranger, or to reserve it in a grant of the dominant tenement, the easement must either be extinguished or else remain still attached to the land.² But as to which of these results legally follows the attempted severance, there is curiously little authority. Some language in the old books,³ together with a modern dictum,⁴ points toward the extinguishment of the easement; while the alternative conclusion is supported by scattering dicta,⁵ and a strong line of recent decisions in New York.⁶ The latest of these has just been handed down. *Freund v. Biel*, 35 N. Y. L. J. 1567 (App. Div., July, 1906). The latter view seems preferable. Whether the attempt to sever the easement be by grant or reservation, there is lacking the intention requisite for an abandonment of it;⁷ for the parties to the conveyance intend — as indeed in this latest New York case was expressly stated in the instrument — not to abandon the easement, but to keep it in existence though severed from the land. Furthermore, in spite of the common law hostility toward easements, there seems to be little justification for introducing a doctrine according to which the easement is extinguished by a transaction solely between the owner of the dominant tenement and a stranger, his grantee, to the certain detriment of one, and to the benefit of neither, but only of the servient tenement.

Admitted that the attempted severance leaves the easement unextinguished and still appurtenant, the further question arises, what rights, if any, accrue therefrom to the person in whose favor the attempt was made? The only answer of authority seems to lie in some of the New York decisions previously mentioned. In these cases the owners of land with easements appurtenant, which were infringed by elevated railroad structures, granted the dominant tenements, "reserving the easements" or "reserving all claim or rights of action" for future damages thereto. The grantees were held liable as trustees for the grantors of all moneys received for the invasion of the easements, although it was admitted that neither the easements nor the rights of action for the infringement of them could be held in trust.⁸ The foundation for the trust was obtained by torturing the words of reservation into a contract to pay these sums as part of the purchase price of the land.⁹ But this reasoning is wholly fictitious: the grantor's words of reservation do not and cannot impose upon the grantee the active duties of the contractual obligation. In reality, if any equity does flow to the grantor because of the words of reservation, it seems that its source must lie in a mutual mistake of law made in supposing that the easement itself could be reserved. If the

¹ *Hall v. Lawrence*, 2 R. I. 218, 243.

² See *Phillips v. Rhodes*, 7 Met. (Mass.) 322, 324.

³ See 4 Vin. Abr. 594 (O).

⁴ See *Cadwalader v. Bailey*, 17 R. I. 495, 503.

⁵ See *Moore v. Crose*, 43 Ind. 30, 34.

⁶ *Pappenheim v. Metropolitan, etc., Ry. Co.*, 128 N. Y. 436, 446; *Kernochan v. N. Y., etc., R. R. Co.*, 128 *ibid.* 559, 568; *Pegram v. N. Y., etc., R. R. Co.*, 147 *ibid.* 135; *Foote v. Metropolitan, etc., Ry. Co.*, 147 *ibid.* 367; *Shepard v. Manhattan Ry. Co.*, 169 *ibid.* 160; *Western, etc., Co. v. Shepard*, 169 *ibid.* 170; *McKenna v. Brooklyn, etc., R. R. Co.*, 184 *ibid.* 391.

⁷ See *Foote v. Metropolitan, etc., Ry. Co.*, *supra*.

⁸ *Western, etc., Co. v. Shepard*, *supra*; *Freund v. Biel*, *supra*. See also *Pegram v. N. Y., etc., R. R. Co.*, *supra*; *McKenna v. Brooklyn, etc., R. R. Co.*, *supra*.

⁹ See *Western, etc., Co. v. Shepard*, *supra*, 180.

parties had understood the legal effect of the words of the instrument in question, would any court have labored to raise the equity? If rescission for mutual mistake of law be allowable, the court of equity might well allow the grantee the option of indemnifying the grantor for the loss resulting from the mistake, by handing over the sums recovered for the infringement of the easement,—substantially the result attained by the New York courts. Although any suggestion of rescission for mutual mistake as to the legal effects of an instrument has been consistently repudiated in New York,¹⁰ yet the recent decisions may indicate a tendency to apply the doctrine, at least in certain cases. With the application of this principle the results reached in these easement cases seem correct; without it there appears to be difficulty in discovering any basis for legal or equitable rights in these attempts to sever easements.

EJECTION OF A PASSENGER WHO PRESENTS A WRONG TRANSFER CHECK.—There is apparently a growing tendency on the part of the courts to hold that, where a passenger has been furnished with a wrong ticket, a conductor after hearing an explanation of the circumstances evicts the passenger at his peril on the latter's refusal to pay another fare. A late case so decides. *Georgia Ry. & Electric Co. v. Baker*, 54 S. E. Rep. 639 (Ga.). Not only are the authorities upon this point in serious conflict,¹ but often the reasoning of the same court in different cases is inconsistent. It is of course well settled that if a passenger who is rightfully on a car with a proper ticket is evicted through the conductor's mistake as to the sufficiency of the ticket, such ejection is a tort, and the company is liable.² Even when a wrong transfer is given, some courts seem to proceed upon the theory that the passenger is rightfully on the second car, since the journey is considered continuous, irrespective of the necessity for a change of cars. Such a view is, however, inconsistent with the facts of the case. A railroad is not under obligation in return for the payment of a fare to carry a passenger to his ultimate destination, but to carry him to the transfer point, and to furnish him with a ticket which shall entitle him to take another car at that point.³ In issuing a transfer, therefore, the first conductor is in no different situation from the agent who sells a ticket in the station.

When a station agent makes a mistake in issuing a ticket, some courts, though holding that ordinarily the railroad is not liable in tort for a subsequent eviction, make a distinction if the invalidity of the ticket would not be apparent to the holder upon a reasonable examination, and under such circumstances permit a recovery for the eviction.⁴ The basis for this distinction is apparently founded on some idea of contributory negligence on the part of the passenger. Other courts adopt reasoning which leads to exactly the opposite result, and hold that the eviction is lawful, except where

¹⁰ See *Arthur v. Arthur*, 10 Barb. (N. Y.) 1; *Curtis v. Albee*, 167 N. Y. 360, 364; also *Western, etc., Co. v. Shepard*, *supra*, 180.

¹ *Indianapolis St. Ry. Co. v. Wilson*, 161 Ind. 153; *Cleveland City Ry. Co. v. Conner*, 78 N. E. Rep. 376 (Oh.). *Contra*, *Norton v. Consolidated Ry. Co.*, 63 Atl. Rep. 1087 (Conn.); *Little Rock Ry. & Electric Co. v. Goerner*, 95 S. W. Rep. 1007 (Ark.).

² See 9 HARV. L. REV. 221.

³ *Norton v. Consolidated Ry. Co.*, *supra*.

⁴ *Murdock v. Boston & Albany R. R. Co.*, 137 Mass. 293. *Cf.* *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407.

from the face of the ticket the conductor should see that a mistake had been made, — as where a mileage book was marked to expire on the day that it was issued.⁶ Now, when the passenger pays his money to the ticket agent, no contract is formed by which the railroad agrees to carry the passenger to his destination. It is not the business of the ticket agent to make contracts for the railroad, but to sell tickets.⁶ Therefore the courts which hold to the above view, and yet say that it is a contract and not the ticket that gives the right to transportation, misinterpret completely the nature of the ticket. The true view is that the ticket is the sole valid evidence of the passenger's right to be upon the car.⁷ To conduct railroads on any other principle would be impossible.⁸ A person who is not supplied with the proper ticket is not rightfully upon the car, and his eviction upon failure to pay another fare is lawful, except that courts might draw the line in the rare case where the conductor actually knows the true facts. The railroad is of course liable; not, however, for a wrongful eviction, but in an action of contract for breach of implied warranty in failing to supply the ticket asked for,⁹ or possibly in an action on the case founded on the negligence of the ticket agent. In either case, however, the passenger should suffer the inconvenience of paying another fare, and should not be allowed to increase the damages by requiring the conductor to eject him.¹⁰

THE TAXABLE SITUS OF TANGIBLE PERSONAL PROPERTY. — It is elementary that a state cannot tax tangible property which has neither a legal nor a physical situs therein.¹ A tax on tangible property is in theory a price exacted for protection given; and if the property is neither actually nor constructively situated where it can enjoy such protection, the tax is constitutionally invalid, as a taking of property without due process of law.² How far a state may constitutionally tax its citizens according to their ability to pay, — as by a tax on incomes, — or exact a price for a privilege conferred, — such as a franchise, — presents different questions, which will not be discussed. The question here is simply how and when tangible personalty acquires a situs in one or more states, so that a tax thereon is constitutionally valid.

In ancient times the maxim *mobilia sequuntur personam* applied alike to tangible and intangible personalty. To-day, if tangible personalty remains in a state a sufficient time, it may acquire a taxable situs therein, though the owner is domiciled in another state.³ If, however, the use to which the property is put prevents it from acquiring a physical situs, the maxim may be applied to determine the legal situs for taxation. Thus a vessel engaged in interstate commerce is taxable at the owner's domicile,⁴ although

⁶ *Krueger v. Chicago, etc., Ry. Co.*, 68 Minn. 445.

⁶ See 1 HARV. L. REV. 30.

⁷ *N. Y., etc., Ry. Co. v. Bennett*, 50 Fed. Rep. 496. See also 10 HARV. L. REV. 186; 12 *ibid.* 61; 14 *ibid.* 70.

⁸ See *Poulin v. Canadian Pac. Ry. Co.*, 52 Fed. Rep. 197, 199.

⁹ *Western Maryland R. R. Co. v. Schaun*, 97 Md. 563. See also 9 HARV. L. REV. 353.

¹⁰ *Hall v. Memphis & Charleston R. R. Co.*, 15 Fed. Rep. 57.

¹ *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409.

² *Union, etc., Transit Co. v. Kentucky*, 199 U. S. 194.

³ *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18.

⁴ See *St. Louis v. The Ferry Co.*, 11 Wall. (U. S.) 423. See *Ayer & Lord Tie Co. v. Kentucky*, *supra*.

if it ply wholly within one state its taxable situs is there, no matter where the owner is domiciled.⁵ Consequently in regard to a single unit, the artificial situs of domicile controls only in the absence of an actual situs elsewhere.

The taxable situs of a mass of property, such as the rolling stock of a railroad, the specific units of which are constantly moving from state to state, is a question of greater difficulty, which as yet is but partly settled. Property in through transit manifestly cannot acquire a taxable situs,⁶ at least so far as the units are concerned. But where a constant average of such units is maintained within the state and enjoys the protection of its laws, it is manifestly unfair that this average should contribute no taxes, even though each particular unit is continually in transit through the state. It was therefore held in *Pullman's Co. v. Pennsylvania*⁸ that a foreign corporation might be taxed upon the average number of cars annually within the state, though no particular car obtained a taxable situs therein. This decision was supplemented by *Union Transit Co. v. Kentucky*,² which held that a domestic corporation cannot be taxed upon those of its cars permanently beyond the state. And a recent case has decided that a domestic railroad corporation may be taxed upon all its rolling stock, even though specific cars go from time to time beyond the state, on the ground that the state of origin remains the permanent situs, notwithstanding occasional excursions. *New York ex rel. N. Y. C., etc., R. R. Co. v. Miller*, 202 U. S. 584. The net result of these decisions is that a railroad cannot be taxed as much as twice upon the whole of its rolling stock, although the question is still undecided whether it may not be taxed twice upon a portion. In other words, although it is clear that the whole rolling stock cannot have a taxable situs in two states at once, it is not settled whether, if a portion obtain a taxable situs in another state, though none of the specific cars do so, such portion ceases to be taxable at the domicile of the corporation. When considered in connection with the Pullman case, the reasoning, though not the decision, in the Union Transit case indicates that this portion would cease to be taxable at the domicile of the corporation, whereas the reasoning in the Miller case indicates that it would not. Certainly the more desirable result is reached by following the former case. It is just that property should be taxed on its full value; it is equally just that no part be taxed twice.⁷

RESPONSIBILITY OF THE DRAWER OF A NEGLIGENTLY DRAWN CHECK. — There is apparently no American case directly deciding where liability shall be placed, when a depositor draws a check in such form as to enable a third person by an insertion to raise the amount successfully, so that a bank using reasonable care honors the check for the altered amount.¹ In similar situations involving other negotiable instruments, there are a number of American decisions, the majority of which hold the careless maker or drawer liable for the altered sum.² The ground taken is that, where one of two innocent

⁵ *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299.

⁶ *Kelley v. Rhoads*, 188 U. S. 1.

⁷ See also 19 HARV. L. REV. 206.

¹ *Exch. Bk. of Spokane v. Bk. of Little Rock*, 58 Fed. Rep. 140, must be distinguished. The draft there was in the hands of a discounter, and the doctrine of *caveat emptor* applied.

² *Merritt v. Boyden*, 119 Ill. 136. *Contra*, *Knoxville Nat'l Bk. v. Clark*, 51 Ia. 264.

parties must suffer, if one is faultless and the other guilty of some lack of care which presented the opportunity for the commission of the damaging act, the loss should fall upon the latter.³ This reasoning applies with equal force to careless drawers of checks. The courts in the minority jurisdictions have objected that a drawer or maker, merely because he is careless, should not be forced into a contract other than he has made,⁴ and that, since he owes no duty, he cannot be legally negligent.⁵ But these arguments can still less be successfully urged on behalf of careless drawers of checks. In the first place a check is an order to pay, and not a contract, thus resembling a bill of exchange before acceptance. A check may become a contract by certification, but that is not the usual course. Whatever force, therefore, the first objection may have in the case of accepted bills of exchange and of promissory notes, which are contracts, it has no application to uncertified checks. In the second place the depositor does owe a duty to the bank. The contractual obligation of the bank to honor all of its customer's orders to pay, up to the amount of his deposit, certainly carries with it the correlative obligation of the customer not to put obstacles in the way of the bank's performance by his carelessness in drawing these orders. Further, contrary to what has occasionally been suggested, the defrauding of the bank is the proximate result of the depositor's negligence. Undoubtedly the chain of causation is generally broken by the intervention of the criminal act of a third party; but here the act is one that a reasonable man should have anticipated, as is evidenced by the precautions generally taken in drawing checks. In every case the liability of the drawer should depend upon whether or not, as a matter of fact in the particular circumstances, he employed reasonable care.⁶ Thereby responsibility is expediently attached to the only person whose care can eliminate the successful commission of this fraud.

In England, in the first case on the subject, the court held the negligent drawer of a check responsible.⁷ In the next important case the acceptor of a negligently drawn bill of exchange, raised after acceptance, was held not liable on the bill to a *bona fide* holder for value,⁸ and the court, noticing that the earlier case dealt with a check, did not even profess to overrule it. The early decision has been followed by other cases involving checks, and though doubted somewhat in dicta in distinguishable cases, it has stood until the Judicial Committee of the Privy Council recently decided that the careless drawer of a check was to be protected in preference to the bank. *Colonial Bank of Australasia v. Marshall*, 22 T. L. R. 746. In so holding, the case is opposed to previously existing English authority, and, it seems, to the better legal view.

RIGHTS OF DEPOSITOR UPON SUB-DEPOSIT MADE BY DEPOSITARY BANK. — The claim of a bank against a second bank in which it has made a deposit of money is ordinarily an asset attainable by any creditor of the first bank; but in at least two instances it is believed that, upon an applica-

³ See *Capital Bank v. Armstrong*, 62 Mo. 59, 67.

⁴ See *Worrall v. Gheen*, 39 Pa. St. 388.

⁵ See *Fordyce v. Kosminsky*, 49 Ark. 40, 45.

⁶ *Leas v. Walls*, 101 Pa. St. 57.

⁷ *Young v. Grote*, 4 Bing. 253.

⁸ *Scholfield v. Earl of Londesborough*, [1896] A. C. 514. See 8 HARV. L. REV. 418.

tion of the general rules of the law of trusts, the facts will be found to show that the first bank holds its claim against the second in trust for a particular depositor of the first bank. The first case arises where a sum of money is deposited in a bank to be forwarded to a correspondent bank, in order that the latter may meet at maturity an obligation of the depositor payable in the locality of the correspondent bank. Here the depositary bank, after forwarding the money, has against its correspondent bank, until the latter has met the obligation, a claim or credit running to it which, it is submitted, the first bank holds in trust for its client; for the first bank has no beneficial interest in the claim, but has created it solely for the sake of the depositor. Accordingly, the failure of the depositary bank at this stage of the transaction would find the depositor a secured creditor to the extent of this claim of which the bank had become trustee for him.¹ This result is but just, as a contrary rule would leave the depositor exposed to the double hazard of loss by the failure of either the depositary or the correspondent bank.

The second instance arises where the depositary bank makes a deposit with a second bank out of the funds received from a particular depositor, upon the understanding that the first bank is to draw upon the second only when the original depositor draws upon the first bank, and only for the second bank's proportionate share of such drafts. Here, by its agreement, the first bank has no right to use its claim against the second bank as general assets to meet any debt, but is confined to an application of the claim for the benefit of the original depositor. It will be noted that this case, though it arises in a different manner from the first, is similar to the first case in all respects except that here the sub-deposit is made, not, as above, at the request of the original depositor, but upon the motion of the depositary bank without any request by its client, and even, it may be, without his knowledge. But as notice to the *cestui* of the declaration of a trust is not necessary to its validity,² this difference is immaterial. In neither case is any element of a complete trust lacking. The legal title is in the bank, the beneficial interest in the depositor. That the parties did not call the transaction a trust is not fatal, for no form of words is necessary to the creation of a trust.³ It is true that in both cases the depositary bank would doubtless have the right, as against the depositor, to revoke the transaction with the second bank; but this is not inconsistent with the existence of a trust. Although, if the power of revocation is not reserved expressly or impliedly, a trust is irrevocable, yet there is no doubt that a trust may be revocable by its terms.⁴ Accordingly, it has been held that in the second case, also, upon the failure of the first bank the depositor is entitled as *cestui* to receive in full the proceeds of the first bank's claim against the second, in preference to the general creditors.⁵

A recent federal decision presents the same facts as in the second case, and attains the same results, but bases its conclusion upon the existence of an illegal agreement between the two banks to refrain from real competition in bidding for the original deposit and to divide it up secretly. *In re Salmon*, 145 Fed. Rep. 649 (Dist. Ct., W. D. Mo.). The reasoning of this decision, based, as it is, upon the right of the depositor to follow property

¹ Farley v. Turner, 26 L. J. Ch. 710; St. Louis v. Johnson, 5 Dill. (U. S.) 241.

² Martin v. Funk, 75 N. Y. 134.

³ Ames, Cas. on Trusts, 2 ed., 97 n. 2.

⁴ Perry, Trusts, 5 ed., § 104.

⁵ Marquette v. Wilkinson, 119 Mich. 413.

obtained from him illegally, is not inconsistent, however, with that already set forth, for each theory presents a distinct and adequate basis for recovery. But the suggested theory of express trust is not restricted in its scope to cases of illegality.

WHAT CONSTITUTES SUFFICIENT CONNECTION WITH THE FAMILY TO RENDER ADMISSIBLE THE DECLARATIONS OF A DECEASED PERSON CONCERNING PEDIGREE. — The weight of authority now has clearly established that declarations as to pedigree are not admissible unless made by a deceased member of the family.¹ And unless the declarant is speaking of facts in his own life which bear on pedigree,² he must be connected with the family in advance by evidence independent of his own statements.³ The cases, however, are in some confusion in determining what foundation must be laid to render admissible the declarations of a member of one family that another member thereof is related to a different family. Several cases appear to decide, either directly or indirectly, that the declarant must be connected with both families.⁴ A somewhat obscure sentence in *Greenleaf* is sometimes cited to the same effect;⁵ but the authority of this is greatly weakened by a sentence directly *contra* on the same page.⁶ On the other hand, there are cases which hold that it is sufficient to show declarant's connection with one family;⁷ and Wigmore strongly supports this view.⁸ A late case now raises the question again, and, after considering both lines of authority, squarely decides that to connect the declarant either by blood or by marriage with the person who has died seised is unnecessary, if the declarant be shown to be related to the alleged heir. *Overby v. Fohnston*, 94 S. W. Rep. 131 (Tex. Civ. App.).

The question at hand really goes to the basis of the "pedigree" exception to the hearsay exception. Hearsay, though relevant, is excluded on the theory that its persuasive effect on the jury is likely to exceed its probative effect on the case.⁹ It is difficult to show when such evidence is incorrect or self-serving. But in the case of pedigree, hearsay is admitted because of the difficulty of obtaining better evidence; yet, as a check to incorrectness, most courts yield to necessity only to the extent of admitting the declarations of relatives.¹ But for the sake of correctness there seems no need that the declarant should be shown to be connected with both families. A statement by a Smith that the Roe family is connected with the Smith family not only touches the Roe pedigree, to which the Smiths are *prima facie* strangers, but it equally touches the Smith pedigree, on which the Smiths are entitled to speak. As a check on self-serving declarations, the courts now admit only those made *ante litem motam*.⁸ But though this restriction effectively excludes evidence manufactured for

¹ *Johnson v. Lawson*, 2 Bing. 86; *Waldron v. Tuttle*, 4 N. H. 371. *Contra*, *Alston v. Alston*, 114 Ia. 29.

² *Allen v. Hall*, 2 Nott & McC. (S. C.) 114.

³ *Young v. Schulenberg*, 165 N. Y. 385; *Falkerson v. Holmes*, 117 U. S. 389.

⁴ *Hitchins v. Eardley*, L. R. 2 P. & D. 248. See *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175; *Doe d. Dunlop v. Servos*, 5 U. C. Q. B. 284.

⁵ *Greenleaf*, Ev., 16 ed., 198.

⁶ *Vowles v. Young*, 13 Ves. Jr. 140; *Monkton v. Atty.-General*, 2 Russ. & M. 147; *Sitler v. Gehr*, 105 Pa. St. 577; *Gehr v. Fisher*, 143 Pa. St. 311.

⁷ 2 Wigmore, Ev., § 1491.

⁸ *Berkeley Peerage Case*, 4 Camp. 401.

the case at bar, it clearly does not keep out all self-serving declarations. If the Roes are rich, and the Smiths are poor, there is an obvious inducement to the Smiths to claim kinship with the Roes even before any controversy arises. The rule which requires connection with both families would certainly discourage a good many unscrupulous claims; but it would equally exclude an admission of relationship with the Smiths by one of the Roes. The great objection to such a rule, however, is that it requires an absurdity. If the plaintiff must show that the declarant Smith is connected with the Roes before the declarations can be admitted, he is in effect compelled to prove his own connection with the Roes in order to get in the very evidence he relies on to establish that connection, — except in such an unusual case as where the individual declarant's declarations might be admissible on the Roe pedigree by reason of the declarant Smith having married into that family. A rule which makes such an impractical requirement is scarcely desirable, and the case at hand is to be welcomed as an added authority against it.

OWNERSHIP IN A PLAN. — In the early law there was considerable dispute among the authorities on the question of ownership in intellectual creations. One view, earnestly advocated by Lord Mansfield, among others, was that intellectual creations were property like other species of property and belonged absolutely to their creator.¹ The other theory was that the producer of an intellectual work had no natural property therein and enjoyed only such rights as the public chose to confer.² The latter theory is the one that has come to prevail in the law today. A late case follows this view in deciding that the originator of a scheme of industrial organization has no right of property in it. *Haskins v. Ryan*, 64 Atl. Rep. 436 (N. J. Eq.).

We may take it as settled that an author, painter, or composer has no common law property right in his mental creation after he has given it to the public, or, in the technical phrase, has "published" it. Any one may reproduce it or use it as he sees fit.³ To be sure, until publication, the creator has over it sole control;⁴ but this control does not depend on any property right in the creation, though doubtless there is in the cases loose language which might lead to that conclusion.⁵ It is universally admitted that a person to whom the author or composer communicates his work may make what use he pleases of the knowledge so gained, except to multiply copies of the work.⁶ This right of "copy" is impliedly reserved by the author in any communication short of publication, and for the recipient of the communication to reproduce the mental creation would be unfair and a breach of confidence.⁶ The creator's right, then, would seem to be not a property right in the creation, but the incorporeal right of "copy."⁷ As regards inventions, there is no doubt that any one who by fair means gains

¹ *Millar v. Taylor*, 4 Burr. 2303, 2399.

² *Donaldson v. Becket*, 2 Bro. P. C. 129.

³ *Keene v. Kimbal*, 16 Gray (Mass.) 545.

⁴ *N. J. State Dental Society v. Dentacura Co.*, 57 N. J. Eq. 593.

⁵ See *Aronson v. Baker*, 43 N. J. Eq. 365; *Grigsby v. Breckinridge*, 2 Bush (Ky.) 480.

⁶ See *Tompkins v. Halleck*, 133 Mass. 32.

⁷ See *Jefferys v. Boosey*, 4 H. L. Cas. 815, 888.

a knowledge of the new idea may, in the absence of a statutory patent, use the knowledge as he wishes, even to the extent of reproducing the invention itself.⁸ There is no property right in such a conception.⁹ Trade secrets are treated the same way, for they are essentially nothing more than plans or schemes. Though equity often enjoins the divulging of them, the reason is always to prevent a breach of trust or confidence, even if the language used appears to indicate a property right in the idea.¹⁰ That there is no such property right is best shown by the fact that if one comes *bona fide* by a knowledge of the secret, he can use it free from interference on the part of the creator.¹¹

Thus, running through the law, is a complete denial of any ownership in any intellectual work as such. Once ideas are communicated, they irrevocably become part of the recipient's mental make-up. They are as much his as the originator's. Once knowledge is acquired, the common law acting *in rem* is powerless to take it away. And if no breach of trust or confidence is involved, no reason is seen why such a possessor of ideas may not use them as well as the creator of them. As the right of property connotes the capability of using or disposing of the subject of property to the exclusion of all others,¹² the result follows that there is none in a plan or scheme.¹³

RECENT CASES.

BANKRUPTCY — GROUNDS FOR REFUSING DISCHARGE — OBTAINING PROPERTY BY FALSE STATEMENT IN WRITING. — A bankrupt, three weeks before filing his voluntary petition in bankruptcy, obtained property on credit by means of a fraudulent written statement as to his solvency. The creditor thus defrauded was, however, fully paid before the bankruptcy proceedings. *Held*, that a creditor other than the defrauded person may successfully plead the fraudulent writing in opposition to the bankrupt's discharge, under the amendment of 1903 to § 14 *b* of the Bankruptcy Act of 1898. *In re Harr*, 143 Fed. Rep. 421 (Dist. Ct., E. D. Mo.).

The provision here involved provides that the bankrupt's discharge may be refused if he has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." The ground thus furnished for opposing a bankrupt's discharge is a novelty in bankruptcy laws, but the conclusion reached, that a creditor other than the party defrauded may take advantage of the provision, could not be avoided, except by a wholly unwarranted perversion of the language used in the statute. The present case involves the first decision on the point, though the same question has previously been referred to. See *In re Dresser*, 13 Am. B. Rep. 616.

BANKRUPTCY — PRIORITY OF CLAIMS — PRIORITY OF LIENS OVER WAGE-EARNERS' CLAIMS. — The bankrupt, when solvent, assigned to a bank part of the sum to become due on a paving contract. After bankruptcy several unpaid

⁸ *Brown v. Duchesne*, 19 How. (U. S.) 183. See also *Wilson v. Rousseau*, 4 How. (U. S.) 646.

⁹ See *Gillet v. Bate*, 86 N. Y. 87.

¹⁰ *Morrison v. Moat*, 9 Hare 241; *Peabody v. Norfolk*, 98 Mass. 452.

¹¹ *Steward et al. v. Hook et al.*, 118 Ga. 445. See also *James v. James*, L. R. 13 Eq. 421.

¹² See *Rigney v. City of Chicago*, 102 Ill. 64, 77.

¹³ See *Bristol v. Equitable Life Assur. Co.*, 5 N. Y. Supp. 131, aff. 132 N. Y. 264; *Burnell v. Chown*, 69 Fed. Rep. 993; *Simmons Hardware Co. v. Waibel*, 1 S. D. 488.

laborers claimed payment of their wages. The estate was not sufficient to pay both the laborers and the bank. *Held*, that the bank has an equitable lien on the proceeds of the contract to the extent of the assignment to it, which lien is superior to the labor creditors' right to priority under the National Bankruptcy Act. *In re Cramond*, 145 Fed. Rep. 966 (Dist. Ct., N. D. N. Y.).

As a result of the assignment, the bank acquired a valid equitable lien on the fund arising from the contract. *Peugh v. Porter*, 112 U. S. 737. And it is well settled that a trustee in bankruptcy takes the property subject to all liens valid as against the debtor and his creditors. *Hewitt v. Berlin Machine Works*, 194 U. S. 296. But § 64 *b* of the Bankruptcy Act provides that wages due laborers shall be given a priority against the estate. U. S. COMP. STAT. 1901, p. 3447. On the other hand, however, § 67 *d* states that certain liens, including those like the present, shall not be affected by the Act. U. S. COMP. STAT. 1901, p. 3449. In order to give effect to this later provision it would seem clear that the lienholders should be paid before the wage-earners are given their priority. Two of the other three cases found on the point are in accord with the present one. *In re Frick*, 1 Am. B. Rep. 719; *In re Kirby-Dennis Co.*, 95 Fed. Rep. 116. In the case *contra* no reason is given for the conclusion. *In re Tebo*, 101 Fed. Rep. 419.

BANKS AND BANKING—DEPOSITS—RIGHTS OF DEPOSITOR UPON SUB-DEPOSIT BY DEPOSITARY BANK.—In order to stifle competition, several banks made an agreement by which bank A submitted the highest bid for county funds and thereby secured the deposit. Following out the agreement, bank A deposited a certain part of the county funds received by it with the other banks, drawing upon them only for their proportionate share of drafts by the county upon bank A. The other banks paid bank A the same rate of interest which A, in accordance with its bid, was paying the county. Bank A failed. *Held*, that the county may recover the sums on deposit in the other banks in preference to the other creditors of Bank A. *In re Salmon*, 145 Fed. Rep. 649 (Dist. Ct., W. D. Mo.). See NOTES, p. 140.

BILLS AND NOTES—CHECKS—NEGLIGENCE OF DRAWER.—An executor drew several checks on the appellant bank, in each instance leaving a space to the left of the amount, and forwarded them to the respondents, his co-executors, who signed them. The first drawer then raised the amounts by filling in the mentioned spaces. The bank, exercising due care, honored the checks for the altered amounts, and the respondents sued the bank. *Held*, that there was no evidence to go to the jury that the respondents violated any duty to the bank, which accordingly is liable for the amount of the forged checks. *Colonial Bank of Australasia v. Marshall*, 22 T. L. R. 746 (Jud. Com. P. C., July 27, 1906). See NOTES, p. 139.

BILLS AND NOTES—DOCTRINE OF PRICE *v.* NEAL—DRAWEE'S RIGHT TO RECOVER PAYMENT OF FORGED CHECK.—The defendant caused to be presented to the plaintiff a check purporting to be drawn by A on the plaintiff in favor of B. The check was indorsed by the defendant and the several parties through whose hands it had passed in the usual course. The plaintiff, as did the defendant, believed the check to be genuine, paid it, and charged it to the account of A. Later it was discovered that A's name had been forged, and the plaintiff brought suit to recover back from the defendant the amount of the check so paid. *Held*, that the money, being paid under a mistake of fact, can be recovered back in the absence of proof that the defendant had been misled or prejudiced by the plaintiff's failure to detect the forgery. *First National Bank of Lisbon v. Bank of Wyndmere*, 108 N. W. Rep. 546 (N. D.).

This case is contrary to the well-settled doctrine of *Price v. Neal*. For a full discussion of the principles involved, see 4 HARV. L. REV. 297; 16 *ibid.* 514.

CARRIERS—EJECTION OF PASSENGER—PRESENTATION OF WRONG TRANSFER CHECK.—A conductor gave a passenger a wrong transfer check, which the conductor of a second car refused to accept. The passenger was evicted on

failure to pay another fare. *Held*, that the company is liable in damages for the eviction. *Georgia Ry. & Electric Co. v. Baker*, 54 S. E. Rep. 639 (Ga.). See NOTES, p. 137.

CARRIERS — LIENS — CONVERSION BY REFUSAL TO DELIVER DAMAGED GOODS WITHOUT PAYMENT OF FREIGHT. — The defendant, a carrier, so negligently delayed the transmission of certain goods consigned to the plaintiff that the damages due to the delay were greater than the amount of the freight charges. Without tendering these charges, the plaintiff demanded the goods, and upon the carrier's refusal to deliver them without payment, brought suit for their value. *Held*, that the plaintiff may recover, because the carrier has been guilty of conversion. *Missouri Pacific Ry. Co. v. Peru-Van Zandt Implement Co.*, 85 Pac. Rep. 408 (Kan.).

It has been held for almost half a century that a consignee whose goods have been damaged in transit can offset his claim against the charges for freight. *Gleadell v. Thomson*, 56 N. Y. 194. Reasoning from this position, the further decision has been made that, if the damages equal or exceed the amount of the freight, the carrier's lien is destroyed entirely and the consignee may bring replevin. *Bancroft v. Peters*, 4 Mich. 619. The result obtained in allowing replevin is highly satisfactory, since it allows the owner the possession and use of his goods, settling at the same time the dispute as to freight and damages. See *Dyer v. Grand Trunk Ry. Co.*, 42 Vt. 441. The result in trover is harder for the carrier, for it compels it to pay for the goods and become a retail merchant to prevent loss. See *Miami Powder Co. v. Port Royal, etc., Ry. Co.*, 38 S. C. 78. But, granting that replevin lies properly, trover should also logically be allowed; and even from an equitable point of view it is justifiable. It saves the consignee the unnecessary advance of the freight charges, and simply imposes on the carrier the necessity of deciding at its peril whether or not the damage is in excess of the freight, without causing it any loss unless it unwisely asserts the lien.

CARRIERS — STEAMSHIPS — RIGHT OF PASSENGER TO BERTH. — The plaintiff, on buying a ticket for a steamboat journey over-night, asked for a berth. He was told that he must wait until the boat had started. He complied, but was unable to get a berth, and had to sit up all night. Thereupon he brought action. *Held*, that, on this evidence, it is error to grant a nonsuit. *Patterson v. Old Dominion S. S. Co.*, 53 S. E. Rep. 224 (N. C.).

Carriers must serve their passengers with adequate facilities for their comfort as well as for their safety. *Fort Worth & D. C. Ry. v. Hyatt*, 12 Tex. Civ. App. 435. To the carrier's discretion is left open the whole scope of reasonable facilities; only when affirmatively shown to be unreasonable will the courts interfere. *Gardner v. Providence Telephone Co.*, 23 R. I. 312. On voyages of length it seems that a berth must be provided and that custom includes it in the price of transportation. *The Oriflamme*, 3 Saw. (U. S.) 397. As to carriage by water over-night a distinction must be made. Sleeping-quarters involve additional compensation, passengers frequently travel without them and companies habitually oversell their accommodations. In view of these customs a traveler reasonably expects with his passage-ticket only the privilege of buying a berth if he apply in time. Having professed, however, to sell berths, the company should, in reason, provide an appropriate place for their purchase before the passenger has irrevocably committed himself to the journey. *Chicago & Alton Ry. v. Flagg*, 43 Ill. 364. Furthermore, silence, as here, when the supply is exhausted would seem to amount to a misrepresentation. The decision may be rested on either of these grounds.

CHINESE EXCLUSION ACTS — EXCLUSION OF CHINAMAN CLAIMING CITIZENSHIP. — *Held*, that a Chinaman within the United States who resists deportation on the ground that he is an American-born citizen, may not be deported until the right of the government to deport him has been judicially reviewed. *Moy Suey v. United States*, 33 Nat. Corp. Rep. 40 (C. C. A., Seventh Circ., April, 1906).

The court holds that there is a fundamental distinction between this case and that of a Chinese citizen of the United States who has left the United States and is excluded when he seeks to return. For a discussion of the latter case, see 19 HARV. L. REV. 60.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — ADMINISTRATION OF ESTATE OF LIVING PERSON. — A state statute provided that the orphans' court might, under certain restrictions, judicially determine to be dead any person who had been absent and unheard of for seven years. Under this statute a petition was filed asking that letters of administration be granted upon the estate of such an absentee. The court decreed the absentee judicially dead, and granted the letters as prayed. An appeal was taken. *Held*, that the lower court was without power so to decree, as the statute is null and void under the due process clause of the fourteenth amendment to the Constitution of the United States. *Savings Bank of Baltimore v. Weeks*, 64 Atl. Rep. 295 (Md.).

The decision is sustained by authority. For a discussion of a case which involved the interpretation of a similar statute, see 19 HARV. L. REV. 535.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — DELEGATION OF LEGISLATIVE POWERS TO BOARDS OF HEALTH. — An act of assembly provided that the boards of health of boroughs should adopt suitable rules for the registration of plumbers, and that breach of these rules should be a misdemeanor punishable by a fine or imprisonment. Under this act the Board of Health of Dubois provided that every master plumber should register his name and address, and, upon showing certain qualifications described by the board, should receive a license permitting him to work. The defendants were indicted for doing plumbing without a license. *Held*, that the act of assembly is unconstitutional as a delegation of legislative power. *Commonwealth v. Shafer*, 37 Pittsb. Leg. J. 71 (Pa., Clearfield Co. Ct., May, 1906).

Except in the case of municipal corporations, the legislature cannot constitutionally delegate its lawmaking power to agents. See *In re Kollock*, 165 U. S. 526. This rather vague rule has been liberally interpreted in favor of boards of health. For example, a statute authorizing measures preventive of smallpox confers constitutional authority upon a board to compel vaccination during an epidemic. *Blue v. Beach*, 155 Ind. 121. So a statute giving general sanitary power constitutionally authorizes a board to keep adulterated milk out of a city. *Polinsky v. The People*, 73 N. Y. 65. If it were not for this broad interpretation of the courts, public policy might demand an extension of the exceptional legislative privileges of municipal corporations to boards of health. See *Cooper v. Schultz*, 32 How. Prac. (N. Y.) 107; 19 HARV. L. REV. 203. The case under consideration follows by analogy a decision in the same jurisdiction, that power to prepare a "standard insurance policy" is legislative and may not be delegated to an insurance commissioner. *O'Neill v. The Fire Insurance Co.*, 166 Pa. St. 72. In making this analogy the court attaches importance to the size of the penalty provided by the statute in the present case, but it disregards the significant fact that the agent empowered is a board of health.

CORPORATIONS — STOCKHOLDERS' RIGHTS INCIDENT TO MEMBERSHIP — DISTRIBUTION OF DIVIDENDS IN VIEW OF LIQUIDATION BETWEEN LIFE TENANT AND REMAINDERMAN. — A corporation sold out to a trust and went into liquidation. Part of its assets was retained and turned into cash, which was distributed among the stockholders as a dividend. Both the life tenant and the remainderman of certain stock held in trust claimed this dividend. These assets were admitted on demurrer to represent surplus earnings. *Held*, that the remainderman takes. *Bulkeley v. Worthington Ecclesiastical Society*, 63 Atl. Rep. 351 (Conn.).

Whether life tenant or remainderman is entitled to dividends is determined primarily from the testator's intention as revealed in the instrument of trust; this failing, the law provides rules. *Lowry v. Farmers' Loan & Trust Co.*,

172 N. Y. 137. The Pennsylvania rule apportions to each party that part of the dividend earned during his term. *Earp's Appeal*, 28 Pa. St. 368. The Massachusetts rule seizes upon the time of declaration as its criterion, and gives to the life tenant all cash dividends declared during his life, no matter when earned. *Minot v. Paine*, 99 Mass. 101. Connecticut follows this rule. *Smith v. Dana*, 77 Conn. 543. In their desire to formulate a workable rule, of easy application by trustees and courts, the latter courts have laid great stress on the doctrine that dividends are never due until declared. See 16 HARV. L. REV. 54. This reason for the rule logically forbids its application to dividends declared in view of liquidation, for they are not discretionary dispersals of profits, but ministerial distribution of assets. *Gifford v. Thompson*, 115 Mass. 478; *Brownell v. Anthony*, 189 Mass. 442. The court in the principal case, therefore, properly disregards as immaterial the admission on demurrer that only earnings were represented, and makes the Connecticut law a homogeneous whole. Cf. *Second Universalist Church v. Colegreve*, 74 Conn. 79. The rule seems to be the same whether the liquidation be for reorganization, consolidation, or final wind-up. *Clarkson v. Clarkson*, 18 Barb. (N. Y.) 646; *In re Armitage*, [1893] 3 Ch. 337. No decision has been noted under the Pennsylvania rule. But see *Simpson v. Moore*, 30 Barb. (N. Y.) 637.

CRIMINAL LAW—SPECIFIC INTENT—CRIMINAL RESPONSIBILITY OF DIRECTORS FOR ULTRA VIRES APPLICATION OF FUNDS.—The vice-president of the New York Life Insurance Co., who was also a member of the finance committee, having consented to an *ultra vires* application of the funds of the company, was arrested for statutory larceny. *Habeas corpus* proceedings to the warrant were instituted. *Held*, that there is no evidence disclosed to have justified the magistrate in issuing a warrant. *People ex rel. Perkins v. Moss*, 113 N. Y. App. Div. 329.

This decision reverses that of the lower court, commented upon in 19 HARV. L. REV. 611.

DAMAGES—MEASURE OF DAMAGES—RECOVERY FOR DEATH OF WIFE.—The plaintiff placed his mentally unbalanced wife in the hospital of the defendant for treatment. As she needed constant watching, the defendant contracted with the plaintiff to furnish such service. The defendant negligently failed to guard the woman, and in her delirium she threw herself from the window of her room and was killed. The plaintiff brought suit for breach of the contract, asking as damages the value of the services, care, and affection of his wife. *Held*, that the action for the negligent breach of the contract should be *ex delicto* and not *ex contractu*, and that, treating this cause as an action *ex delicto*, damages cannot be recovered at common law for the death of the wife. *Duncan v. St. Luke's Hospital*, 113 N. Y. App. Div. 68.

The plaintiff in the present case was clearly entitled to his action *ex contractu*. In all cases where the suit is for a breach of duty stipulated for by contract, express or implied, whether case lies or not, assumpsit does. *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222; *Pittsburg v. Grier*, 22 Pa. St. 54; cf. *Brown v. Boorman*, 11 Cl. & Fin. 44. Yet it may well be that by existing law the plaintiff was entitled to nothing more than nominal damages for the breach of his contract. It is settled that at common law no action *ex delicto* lies for the death of a human being. *Green v. Hudson River Rd. Co.*, 28 Barb. (N. Y.) 9; *Major v. Burlington R. R.*, 115 Ia. 309. The reason usually given for the doctrine, *actio personalis moritur cum persona*, is undoubtedly good where the plaintiff sues as personal representative; but where he is suing for loss of services, it utterly fails. As the wrong to the plaintiff is quite independent of the wrong to the deceased, the doctrine which denies recovery for loss of services must be regarded as anomalous. See *Osborn v. Gillet*, L. R. 8 Exch. 88, 93. Yet the rule being established as to tort cases where the duty violated is imposed by law, there seems to be no logical reason why any different result should obtain where the duty violated is imposed by contract. But as the doctrine is anomalous where the action is for loss of services, the court might well have drawn back in the principal case and awarded the damages sought.

DAMAGES — MEASURE OF DAMAGES — RECOVERY FOR MENTAL SUFFERING NEGLIGENCELY CAUSED. — The plaintiff and her invalid daughter, while passengers on defendant's railroad, were greatly annoyed and frightened as a result of the negligence of its employees, but they received no physical impact of any kind. The employees knew of the relationship between the two. *Held*, that the plaintiff, in addition to damages for physical injury resulting from mental suffering caused by the mistreatment of herself, can recover for her mental suffering caused by the mistreatment of her daughter. *Gulf, C. & S. F. Ry. Co. v. Coopwood*, 96 S. W. Rep. 102 (Tex. Civ. App.).

Texas permits recovery for bodily harm due to mental suffering caused negligently without physical impact. *Gulf, etc., Ry. Co. v. Hayter*, 93 Tex. 239. When there is a recognized basis for an original recovery, this jurisdiction allows additional damages for mental suffering caused by the negligent act. *Texas, etc., Ry. Co. v. Armstrong*, 93 Tex. 31. No fault can be found with the decision on the ground that causal connection was broken, for the defendant's servants, knowing of the relationship between the plaintiff and the invalid, could reasonably have foreseen that mental suffering to the plaintiff would result from their acts. But the court might well have refused to go to such an extreme, on the ground of expediency. This stand has been taken in Minnesota. *Sanderson v. Northern Pac. Ry. Co.*, 88 Minn. 162. And the same view had been adopted in a previous Texas case misinterpreted in the present decision. *Pullman Palace Car Co. v. Trimble*, 8 Tex. Civ. App. 335. The majority of jurisdictions allow recovery for mental suffering negligently caused only as an additional element of damage when there has been physical impact. *Kennon v. Gilmer*, 131 U. S. 22. These jurisdictions, however, almost unanimously deny such recovery for mental suffering due to another's injury. *Cleveland, etc., Ry. Co. v. Stewart*, 24 Ind. App. 374. Therefore, generally speaking, the result in the main case would be doubly impossible outside of Texas.

DIVORCE — ALIMONY — RIGHT OF DIVORCED WIFE TO LANDS CONVEYED IN FRAUD OF DOWER AS SECURITY FOR ALIMONY. — A man under engagement to marry made a gratuitous conveyance of land in order that it might not be subject to the dower right of his prospective wife. The grantee knew the object of the conveyance. The marriage took place, and later the wife secured a divorce and alimony. *Held*, that there is a lien on the land conveyed to secure payment of the alimony. *Goff v. Goff*, 53 S. E. Rep. 769 (W. Va.).

The weight of authority is that a later creditor may set aside a conveyance in fraud of a prior one. *Claffin v. Mess*, 30 N. J. Eq. 211. The obligation of a husband not to make conveyances to defraud his wife of dower is similar to the obligation of a debtor not to defeat his creditors by such conveyances. See *Youngs v. Carter*, 10 Hun (N. Y.) 194, 199. When the wife has recovered alimony, she becomes, as to it, a quasi-creditor. See *Bouslough v. Bouslough*, 68 Pa. St. 495, 499. Logically, therefore, the divorced wife should be allowed to set aside the conveyance which was in fraud of her own prior right of dower. And even disregarding the creditor analogy, she should be allowed to do so in jurisdictions where alimony is given as a substitute for dower. Probably where alimony is regarded as a mere allowance for support, the result should also be the same, for it is inequitable that the husband should be allowed to profit by a divorce resulting from his own wrongful conduct. The only case found in point with the present is in accord, and seems to be decided on the ground that the conveyance before marriage was in fraud of the wife's marital property rights in general. *Way v. Way*, 67 Wis. 662.

EASEMENTS — SEVERANCE AND TRANSFER OF RIGHT — EQUITABLE RIGHTS RESULTING FROM ATTEMPTED RESERVATIONS OF EASEMENTS IN GRANTS OF DOMINANT TENEMENTS. — The plaintiff conveyed land to the defendant "reserving the easements in the street . . . now being used by the New York Elevated Railroad Co." The defendant received compensation from the railroad company for the impairment of the easements. *Held*, that the defendant is liable as trustee for the plaintiff of the sums thus received. *Freund v. Biel*, 35 N. Y. L. J. 1567 (N. Y., App Div., July, 1906). See NOTES, p. 136.

EQUITY — JURISDICTION — POWER TO PUNISH MUNICIPAL CORPORATION FOR CONTEMPT. — An injunction having issued against the municipal corporation of Rochester, its officers, agents, and servants, the city violated the injunction. *Held*, that the court may, in its discretion, fine the city for contempt. *Marson v. City of Rochester*, 97 N. Y. Supp. 881.

Independently of authority granted by statute, courts of law of superior jurisdiction have inherent power to punish for contempt. *Ex parte Robinson*, 19 Wall. (U. S.) 505. And a similar power resides in courts of equity, which are courts of record of superior jurisdiction. *Cartwright's Case*, 114 Mass. 230. The jurisdiction of equity to enjoin a municipal corporation in a proper case is, moreover, clearly established. *Lumsden v. City of Milwaukee*, 8 Wis. 485. Therefore the power to punish the corporation in some manner for contempt would seem to follow of necessity. It is true that an old case lays down that where the injunction is addressed exclusively to the corporation, the city cannot be punished for violations of it by its officers. *Mayor of London v. Mayor of Lynn*, 1 H. Bl. 209. But this case turned on the form of the injunction and not on any want of power in the court. See *Davis v. Mayor, etc., of N. Y.*, 1 Duer (N. Y.) 451, 484. Further, in the absence of statutory restrictions, the court may, in its discretion, either imprison, fine, or discharge the offender. See *Ex parte Robinson, supra*. Hence it seems clearly within the power of a court of equity to fine a municipal corporation for contempt.

EQUITY — JURISDICTION — RESTRAINT OF POLICE. — *Held*, that an injunction will issue against police remaining indefinitely upon the premises of the plaintiff when irreparable damage is threatened and there is no reasonable ground for even a suspicion that the plaintiff's business is illegal. *Burns v. McAdoo*, 113 N. Y. App. Div. 165.

This case distinguishes a recent decision of the New York Court of Appeals, commented upon in 19 HARV. L. REV. 382.

ESTOPPEL — ESTOPPEL IN PAIS — OBJECTION TO COURT'S JURISDICTION. — The relatrix asked to be appointed special administratrix of an estate. The court refused her application and appointed another. *Held*, that, in a review of this order, the relatrix is not estopped from setting up that the court did not have jurisdiction to appoint any one to this office. *State v. District Court*, 85 Pac. Rep. 1022 (Mont.).

It is well established that the jurisdiction of courts, being fixed by law, cannot be extended by express acquiescence or request of the parties. *Matter of Will of Walker*, 136 N. Y. 20. Nor can a want of jurisdiction be cured by mere failure to object. *Demilly v. Grosenau*, 201 Ill. 272. Accordingly, it would be highly inconsistent to hold that a jurisdiction not authorized by law could be given by the acts of one party, — the result attained if an estoppel were allowed in the present case. Such estoppel has been allowed in favor of a party who has acted upon the court's ruling. *Carrigan v. Drake*, 36 S. C. 354. But the case at hand lacks even this essential element. Yet, in any of these cases, it is difficult to see how a judgment rendered without jurisdiction could be so affected by equitable considerations between the parties as to be cured by an estoppel arising therefrom, since such judgment is void purely as a matter of substantive law. It is on this ground that a void contract is held incurable by estoppel. *National Granite Bank v. Tyndale*, 176 Mass. 547; see 19 HARV. L. REV. 454. The case at hand, therefore, seems sound and is supported by the majority of cases actually in point. *Freer v. Davis*, 52 W. Va. 1; *contra, Lounsbury v. Catron*, 8 Neb. 469.

EVIDENCE — DECLARATIONS AS TO PEDIGREE — REQUISITE CONNECTION WITH FAMILY. — In an action of trespass to try title to certain land the plaintiff offered in evidence certain declarations of a deceased person as to pedigree. The plaintiff, as a foundation for the admission of the evidence, showed the declarant to be connected with the plaintiff himself, but did not show him to be connected with the party with whom the plaintiff claimed relationship.

Held, that connection with either family is sufficient to render the declarations admissible. *Overby v. Johnston*, 94 S. W. Rep. 131 (Tex. Civ. App.). See NOTES, p. 142.

EVIDENCE — SIMILAR FACTS AND OCCURRENCES — CRIMES OTHER THAN ONE IN ISSUE. — The prisoner was charged with murdering by arsenic poisoning one of her household. Evidence that another of the household had recently died from the same cause was admitted, and the jury instructed to consider it only as evidence that there was arsenic in the house. *Held*, that the evidence is not relevant upon the issue which it was admitted to prove, and that prejudicial error has been committed, even if the evidence be admissible upon other issues. *People v. Collins*, 107 N. W. Rep. 1114 (Mich.).

Evidence of other crimes of a prisoner has a natural probative value, but when relevant simply as establishing the bad character of the prisoner, is excluded, as the law excludes character evidence in such cases. But when evidence of other crimes is relevant in any other way upon the issues in the case, there is no reason for its exclusion. See *Blake v. Albion, etc., Soc.*, 14 Cox C. C. 246. It is well established that such evidence is admissible upon certain issues, such as motive, intent, and the identity of the person charged; but some tendency has appeared to limit the admission to cases involving these issues. See *People v. Molineux*, 168 N. Y. 264. This results from the erroneous idea that admission is an exception to a general rule, while in fact admission is the rule, and exclusion the exception. See 1 WIGMORE, EV., § 216. But in all these cases the relevancy and remoteness of the evidence as regards the issue to prove which it is offered should be closely scrutinized, as here the admission of the evidence, if irrelevant, would greatly prejudice the prisoner. *Commonwealth v. Shepard*, 1 Allen (Mass.) 575, 581. The principal case seems to be governed by these considerations, and to attain a satisfactory result upon the question of relevancy.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS, AND DUTIES — RIGHT TO TRUST FUND HELD BY DECEASED EXECUTOR. — A testator directed his executor to invest his personal property and to pay the income therefrom, together with the rents and profits from his real estate, to his children; and, at their death, to turn over the entire property to his grandchildren. Before this trust was executed the executor died. *Held*, that the administrator *de bonis non* is entitled to the trust fund. *In re Sheet's Estate*, 64 Atl. Rep. 413 (Pa.).

It is well settled that an executor may also be a trustee, but his duties in the two capacities are entirely distinct. *Lord Brougham v. Lord Poulett* 19 Beav. 119. The logical result of this distinction is that the administrator *de bonis non* should succeed only to the executor's duties as executor, and not to those which the executor was under as trustee. Such is the great weight of authority. *Warfield v. Brand's Adm'r*, 13 Bush (Ky.) 77; *contra*, *Mathews, Adm'r, v. Meek*, 23 Oh. St. 272. The court in the principal case intimates that it was the testator's intention that this trust should attach to the office of executor, and was to be enforced by any subsequent administrator. If such were the fact, the case might possibly be supported. But there were no particular facts showing that intention, and to find it here would result in making a rule that the trust should be attached to the office, wherever an executor is directed to act as trustee, — a very undesirable result. The opinion fails to cite two well-considered cases in the same jurisdiction, which on practically similar facts adopt no such construction and reach an opposite result. *Ross v. Barclay*, 18 Pa. St. 179; *Waters v. Margerum*, 60 Pa. St. 39.

GIFTS — GIFTS CAUSA MORTIS — GIFT RETURNED TO DOMINION OF DONOR BEFORE HIS DEATH. — The plaintiff, at the request of the deceased, took a tin box from its place in the closet and brought it to the deceased. The latter took therefrom four bank-books and presented them to the plaintiff as a gift *causa mortis*. The plaintiff put the bank-books back into the tin box, returned it to the closet, locked the door, and put the key back in its usual

place in the deceased's dresser. Nothing was touched until after the donor's death, four days later. *Held*, the facts do not show a gift *causa mortis*. *Parker v. Copland*, 64 Atl. Rep. 129 (N. J., Ct. Err. and App.).

In gifts *causa mortis* there must be a delivery which deprives the donor of all control over the subject of the gift. *Baskett v. Hassell*, 107 U. S. 602. It is also agreed that, because of the great danger of fraud and perjury, there should be no relaxation of the safeguards thrown around such gifts. See *Hatch v. Atkinson*, 56 Me. 324. In the case at hand there had, indeed, been a manual delivery of the gift, but since it was immediately restored to its former position, it cannot be said to have been placed beyond the control of the donor. Further, the fact of the gift here must needs be shown by evidence rather than by possession, which is the very thing that the rule as to delivery is designed to avoid. The decision, therefore, seems eminently sensible, and the few cases in point are in accord. *Bunn v. Markham*, 7 Taunt. 223; *Dunbar v. Dunbar*, 80 Me. 152.

JUDGES — DISQUALIFICATION — INTERESTED MEMBERS SITTING BUT TAKING NO PART. — Upon an appeal to quarter sessions from an order of justices refusing to renew a license, two of the justices who had been present and had taken part in the licensing meeting whose order was appealed from, sat on either side of the chairman and retired with the other justices when they withdrew to consider their decision, but did not vote or take part in the discussion. *Held*, that the proceedings are thereby invalidated and that the appeal must be reheard. *Rex v. Lancashire Justices*, 94 L. T. 481 (Eng., K. B. D., Jan. 12, 1906).

It is of the essence of judicial administration that there should be no appearance or suspicion of bias. *Queen v. Justices of Hertfordshire*, 6 Q. B. 753. Reasonable apprehension of bias based on interest is sufficient to disqualify, — as where the justice sitting was a member of the limited class of qualified pilots specially protected by the penal act under which the defendant was being tried. *Queen v. Huggins*, [1895] 1 Q. B. 563. But mere possibility of bias, based on the fact that the justice was trustee for a person whose security for a loan might be increased in value by the result of the order, was held not to invalidate. *Queen v. Rand*, L. R. 1 Q. B. 230. Nor, in general, will the doctrine of disqualifying interest be pushed to extremes. *Leeson v. General Council*, 43 Ch. D. 366. Hence, in the absence of statutory or constitutional provision, the court's assumption in the present case that a judicial officer is *ipso facto* disqualified from passing upon an order participated in by himself in a lower court, is unsound. *Pierce v. Delameter*, 1 N. Y. 17. The construction of English judicature refutes this idea. If, however, in this case, under English practice the justices might be liable for costs as nominal respondents on the appeal, the court's assumption is correct. *Queen v. Justices of Hertfordshire*, *supra*. But the facts contain no such intimation.

LIBEL AND SLANDER — PRIVILEGED OCCASION — MALICE IN FAIR COMMENT. — The defendant published in *Punch* a criticism of a book written by the plaintiff. The plaintiff brought suit for libel, and sought to introduce extraneous evidence of malice to rebut the defense of fair comment. *Held*, that the evidence is admissible. *Thomas v. Bradbury, Agnew, & Co.*, [1906] 2 K. B. 627.

It is well settled that every author subjects himself to fair comment. See *Sir John Carr v. Hood*, 1 Camp. 355 n.; 11 HARV. L. REV. 53. Great severity of criticism is allowed when the personal character of the author is not attacked. *Cherry v. Des Moines Leader*, 114 Ia. 298. But no personal attack will be permitted. *Triggs v. Sun Printing & Pub. Ass'n*, 179 N. Y. 144. Recently evidence of the writer's state of mind has been admitted as bearing on the fairness of the comment. *Plymouth, etc., Soc. v. Traders' Pub. Ass'n*, [1906] 1 K. B. 403. And it has been intimated that evidence of malice might rebut the defense of fair comment when otherwise valid. See *Cherry v. Des Moines Leader*, *supra*. But it has been left to the present case, by admitting extrinsic evidence of malice expressly on this ground, to decide the point squarely, and

thus to put fair comment on the same basis as the ordinary conditionally privileged statement. The decision seems correct on the ground that fair comment is a privilege based on public policy. Although it is policy to allow the honest critic the greatest freedom of comment, criticism impelled by malicious motives has no just claim to the privilege.

LIBEL — CRIMINAL LIBEL — CORPORATION AS SUBJECT. — *Held*, that a corporation cannot be the subject of a criminal libel. *Commonwealth v. Cochran*, 23 Lanc. L. Rev. 267 (Pa., Ct. Quar. Sess., Lanc. Co., May 26, 1906).

The tendency to cause a disturbance of the peace is generally regarded as the essence of criminal libel. *State v. Burnham*, 9 N. H. 34. Though a corporation as a distinct entity would be incapable of a breach of the peace, its members might naturally become aroused, and others might be incited against them as members. It has been held that a corporation may be indicted for libel. *State v. Atchison*, 3 Lea (Tenn.) 729. There should be as much reason to anticipate a disturbance of the peace when a corporation is the subject of libelous utterances as when it itself is guilty of them. Taking another point of view, it is recognized that a corporation may be either the subject or responsible author of a civil libel. *So. Helton Coal Co. v. N. E. News Ass'n*, [1894] 1 Q. B. 133; *Citizens' Life Assurance Co. v. Brown*, [1904] A. C. 423. As libel is a crime at common law, it would seem to follow that a corporation may be the subject of a criminal libel. No cases squarely on the point have been found except in Missouri. That court, with apparent propriety, holds *contra* to the present decision. *State v. Boogher*, 3 Mo. App. 442. *Cf. State v. Williams*, 85 Pac. Rep. 938 (Kan.).

LICENSES — LICENSOR'S LIABILITY TO LICENSEE — DUTY ON RAILROAD COMPANY OF PREVISION. — A count in a declaration stated that the defendant negligently ran down the plaintiff's intestate, a licensee on its tracks, and that by looking ahead the decedent could have been seen and the accident avoided. *Held*, that the count is demurrable for the reason that the defendant is under no duty of prevision to a bare licensee. *Norfolk & W. Ry. Co. v. Stegall's Adm'r*, 54 S. E. Rep. 19 (Va.).

It is settled that the owner is under no liability to a bare, uninvited licensee to keep the premises in a safe condition. But such licensee does not take the risk of the licensor's superadded negligence actively brought to bear upon him, whether by acts of omission or commission. *Davis v. Chicago & N. W. Ry. Co.*, 58 Wis. 646. The licensor has even sometimes been held liable for passive negligence if the instrument of the injury was known by him to be dangerous and no warning was given. *Harriman v. Pittsburg, C. & St. L. Ry. Co.*, 45 Oh. St. 11. And by the weight of authority a railway company owes a licensee the duty of prevision. *Nuzum v. Pittsburg, C. & St. L. Ry. Co.*, 30 W. Va. 228; *contra, Baltimore & Ohio Rd. Co. v. Schwindling*, 101 Pa. St. 258. It is only reasonable that, so far as is consistent with the railway's paramount duty to protect the lives and property on the train, it should use ordinary care to anticipate and discover that which it has seen fit to permit. Even as to trespassers the same rule applies if their presence can be reasonably anticipated, that is, if it is culpably unknown. *Roth v. Union Depot Co.*, 13 Wash. 525. The present case seems to overrule a previous decision in the same jurisdiction, while citing it with approval. *Cf. Williamson v. Southern Ry. Co.*, 104 Va. 146.

PAUPERS — SUPPORT, SERVICES, AND EXPENSES — LIABILITY OF PAUPER AND PAUPER'S ESTATE. — A pauper had been maintained by the plaintiffs in accordance with a statutory duty for nearly five years, at an expense of £87 17s. Subsequently the pauper came into possession of a considerable amount of money. *Held*, that plaintiffs may recover from the pauper, on common law principles, the amount expended during the entire period. *Birkenhead Union v. Brookes*, 70 J. P. 406 (Eng., K. B. D., May 25, 1906).

The present decision is in harmony with the current of English authority. Prior English cases have allowed recovery from an insane person cared for by local

authorities. *Westham Union v. Pearson*, 54 J. P. 645. Reimbursement from an infant pauper subsequently acquiring property has also been permitted. *In re Clabbon*, [1904] 2 Ch. 465. These decisions evidently control the case of an adult sane pauper, since ability to contract in fact, as the court points out, can be no obstacle to the liability presumed by law. American decisions, however, have refused to recognize any common law liability on the part of a pauper subsequently acquiring property. *Charlestown v. Hubbard*, 9 N. H. 195. Even where the pauper was possessed of property at the time the expenses were incurred, recovery from him, in the absence of fraud, was refused. *Stow v. Sawyer*, 3 Allen (Mass.) 515. The position of the American courts is based on the conception that expenditures for paupers constitute a gift, and therefore do not form a proper basis for the legal implication of liability on quasi-contractual grounds. By statute, however, in America as well as in England, provision is quite commonly made for some recovery from the pauper's property. *Kennebunkport v. Smith*, 22 Me. 445.

PHYSICIANS AND SURGEONS — NECESSITY OF PATIENT'S CONSENT TO OPERATION — OPERATION ON MINOR. — A boy seventeen years old consented, with the concurrence of several adult relatives present, to an operation to remove a tumor from his ear. He died under the anæsthetic. His father sued for damages as the personal representative of his deceased son, on the ground that his consent had not been obtained. *Held*, that, in the absence of negligence on the part of the surgeon, he cannot recover. *Bakker v. Welsh*, 108 N. W. Rep. 94 (Mich.).

It is conceded law that consent makes a surgical operation lawful. See STEPHEN, DIG. CRIM. LAW, Art. 225. But consent alone is not enough to justify what is clearly an aggravated battery. *Bell v. Hansley*, 3 Jones (N. C.) 131. The true justification for such an act must be found in public policy, which demands that a surgeon operate where it is proper for him to do so, though consent will generally be an important or controlling factor in determining the reasonableness of the operation. But the consent to be significant should be given by one of years of discretion. Ordinarily, therefore, the consent of the parent should precede an operation upon a child; but if the child consents, and is, though a minor, in fact of years of discretion, the consent of the parent, especially if other circumstances combine to make action by the surgeon reasonable, should not be essential. The various legal disabilities of an infant have no bearing on his actual discretion in such matters any more than in the case of a married woman, who may by her consent justify a surgeon in operating upon her against her husband's will. *State, use of Janny v. Housekeeper*, 70 Md. 162.

RESTRAINT OF TRADE — CONTRACTS NOT TO ENGAGE IN CERTAIN BUSINESS — DIVISIBILITY OF RESTRICTED AREA. — The defendant contracted with the plaintiff not to engage in the plaintiff's line of business "at any place within a radius of thirty miles from either the Townhall at Bournemouth or the Bargate at Southampton." These places being about thirty miles apart, the circles overlapped. *Held*, that the language is not capable of being construed as defining separate areas, and being as a whole unreasonable, the contract is bad. *Hooper & Ashby v. Willis*, 94 L. T. R. 624 (Eng., Ct. App., April, 1906).

It is settled that a contract in restraint of trade, unreasonable as a whole, will, if the language permits, be construed as severable and enforced within such smaller defined limits as are reasonable. *Peltz v. Eichele*, 62 Mo. 171. If smaller limits are not defined by the contract itself, the court cannot say how much is reasonable restraint and enforce that. *Althen v. Vreeland*, 36 Atl. Rep. 479 (N. J. Ch.). The result in the present English case seems wrong. If, because the circles overlap, only one area is defined, then a contract reading "in London or within 600 miles thereof" should be inseparable, since the unreasonable area cannot be wholly rejected while leaving the other entire. But that contract was held separable. *Price v. Green*, 16 M. & W. 346. Further, if the contract is to be construed, as it ought, from the language alone, regardless of the geographical position of the circles, the same conclusion should be reached whether the circles intersect or not. To say, as the court intimates, that the word "either"

makes a contract inseparable which, in otherwise similar cases, has always been held separable, is too technical and unreasonable to commend itself. See *Davies v. Lowen*, 64 L. T. (N. S.) 655.

STATUTES — INTERPRETATION — CONSTRUCTION OF CONFLICTING CLAUSES. A statute provided in its first section that the term of office of members of the board of county commissioners should be extended to the third Monday in September in order to inaugurate a biennial system of elections. A later section provided that the term of their successors should begin on the first day of December after their election. *Held*, that, since the intent of the legislature, as gathered from the context, is manifestly fulfilled by the first section, the later section will not prevail. *State ex rel. Atty.-Gen. v. Mulhern*, 39 Chi. Leg. N. 62 (Oh., Sup. Ct., June 26, 1906).

In construing a statute inconsistent expressions are to be harmonized, if possible, in order to reach the intent of the legislature. *Matter of N. Y. & Brooklyn Bridge*, 72 N. Y. 527. But when two clauses of a statute are irreconcilable the general rule of construction is that the later clause will control. *Harrington v. Trustees of Rochester*, 10 Wend. (N. Y.) 547. The reason assigned for this rule is that the case is analogous to that in which the proviso of a statute is inconsistent with the enacting clause, in which instance the proviso is made to control on the ground that it expresses the later intent of the legislature. *Townsend v. Brown*, 24 N. J. L. 80. But after all it is largely an arbitrary rule of construction used as a convenient means of settling a difficult question. See *Hall v. Equator, etc., Co.*, Fed. Cas. 5931. And although the rule may be of great value when the intent of the legislature is uncertain, it is surely wise to ignore it in cases like the present, in order to allow the earlier clause to prevail when it clearly expresses the legislative intent. *McCormick v. Village of West Duluth*, 47 Minn. 272.

STREET RAILWAYS — MUNICIPAL REGULATION AND CONTROL — POWER OF CITY TO FORCE COMPANY TO REPAVE. — A city sued to recover from a street railway company for paving with asphalt the space between the rails and to the limit of the sills. The jury found that the portion of the street used by the company had been out of repair; that reasonable notice had been given it to repair with asphalt, and that that sort of paving was necessary and proper. The pavement had not previously been of asphalt. *Held*, that the duty of the city to pave and repair devolves upon the company, unless expressly withheld, and that the city can recover from the company for the paving. *City of Reading v. United Traction Co.*, 64 Atl. Rep. 446 (Pa.).

The duty of a street railway company to pave or repair that part of the street which it occupies is generally settled by statute or the company's charter. When not so provided for, the authorities under the common law agree that the company must restore and keep in good repair that part of the street in which it lays its tracks. *Railway Co. v. State*, 87 Tenn. 746. For improvements beyond this, most authorities hold that the company is not liable, for the reason that it would impair the obligation of the franchise contract. *Dean v. Patterson*, 67 N. J. L. 199. Since, however, a franchise is a doubtful kind of a contract, perhaps a better reason for this rule is that, the company being only a user of the street for a proper street purpose, it is unjust to impose on it a burden not laid on other users, beyond what is necessary for the proper conduct of its business. Pennsylvania, therefore, seems unwarrantably to extend the liability of a street railway when it allows the city to compel it to pay for changing the character of the roadbed. *Cf. McKeesport v. McKeesport Ry.*, 158 Pa. St. 447.

TAXATION — WHERE PROPERTY MAY BE TAXED — TAXABLE SITUS OF TANGIBLE PERSONAL PROPERTY. — The Comptroller of New York assessed all the cars of the relator as "capital employed within that state." The relator offered evidence tending to show that a certain average of the cars was always absent from the state, though it admitted that each specific car might have been in the state at some time during the year; and claimed a deduction for such average. This the defendant refused, and the case came before the Supreme Court on the

ground that the tax was without due process of law. *Held*, that since none of the relator's cars was used exclusively outside the state during the year, the state of New York remains the permanent situs of all the cars, notwithstanding occasional excursions, and hence the tax is proper. *New York ex rel. N. Y. C., etc., R. R. Co. v. Miller*, 202 U. S. 584. See NOTES, p. 138.

TELEGRAPH AND TELEPHONE COMPANIES — LEGAL STATUS — SERVICE OF SUBPŒNA BY TELEPHONE. — The criminal code of Texas allowed the sheriff to serve a subpoena by reading it in the hearing of the witness. A witness was called by telephone, his voice recognized, and the subpoena read to him. On his failing to appear, he was committed for contempt, and sued out a writ of *habeas corpus*. *Held*, that service of a subpoena by telephone is invalid. *Ex parte Terrell*, 95 S. W. Rep. 536 (Tex. Crim. App.).

There seems to be no good reason, in most cases, why conversations by telephone should not be treated the same as conversations face to face. They are, in general, equally admissible as evidence. *Mo. Pacific Ry. Co. v. Heidenheimer*, 82 Tex. 195. It is common for contracts to be made by telephone, and no objections to their validity are sustained on that ground. See *Wolfe v. Mo. Pacific Ry. Co.*, 97 Mo. 473; *cf. Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314. A married woman's acknowledgment by telephone of a deed does not vitiate the deed. *Banning v. Banning*, 80 Cal. 271. But special reasons may alter the case. An oath administered by telephone has been held invalid as not the method most binding on the affiant's conscience. *Sullivan v. Bank of Flatonia*, 83 S. W. Rep. 421. Both the common and the statute law seem invariably to contemplate that a subpoena should be read in the presence of the witness. In addition, the great risk of mistake in identification, by which the sheriff might endanger the interests of another person who needed the witness, is a strong reason for upholding the rule that the telephone is not available for such service.

TITLE, OWNERSHIP, AND POSSESSION — THINGS SUBJECT TO OWNERSHIP AS PROPERTY — OWNERSHIP IN PLAN. — The plaintiff studied the situation with regard to the white lead industry, and formed the plan of organizing the various companies into one company. He communicated the scheme to the defendant to secure from him funds to finance the project. The defendant promised to afford the necessary aid if his lawyers should approve of the plan. Later, without in any manner co-operating with the plaintiff, the defendant organized the company so projected, using the plan originated by the plaintiff. The latter brought a bill in equity, asking for a discovery and an accounting of the profits made by the defendant in the use of the scheme, and for a decree that the plaintiff was entitled to a share of them. *Held*, that the plaintiff has no property right in the plan, and therefore no right to an account. *Haskins v. Ryan*, 64 Atl. Rep. 436 (N. J. Eq.). See NOTES, p. 143.

TORTS — DEFENSES — ASSUMPTION OF RISK BY VOLUNTARY SPECTATOR AT UNLAWFUL EXHIBITION. — The plaintiff was injured at an automobile race held by the defendant under a license from the city of New York. The license being void because of a statute limiting the speed of automobiles, the race was unlawful, though both plaintiff and defendant thought it was lawful. The plaintiff came five miles expressly to see the race. *Held*, that the plaintiff cannot recover on the ground of the unlawfulness of the defendant's act, but can if the injury was caused by its negligence. *Johnson v. Automobile Club*, 36 N. Y. L. J. 163 (N. Y., Ct. App., Oct. 2, 1906).

This decision is based upon the maxim, *injuria non fit volenti*; and although it involves rather a novel application of the rule, the court appears to have applied it properly. Because this maxim usually comes up in master and servant cases, some courts hold that it rests upon contract. *St. Louis Cordage Co. v. Miller*, 126 Fed. Rep. 495. But its real basis is that the voluntary assumption of the risk by the plaintiff with full knowledge, as in the principal case, disproves the duty. *Thomas v. Quartermaine*, 18 Q. B. D. 685. In England and some of the United States it is held that the maxim does not apply where the plaintiff

has a statutory right to protection, but the weight of authority in this country is otherwise. *Knisley v. Pratt*, 148 N. Y. 372; *contra*, *Davis Coal Co. v. Pollard*, 158 Ind. 607. And the present case is supported by the only two decisions squarely in point. *Frost v. Josselyn*, 180 Mass. 389; *Scanlon v. Widgen*, 156 Mass. 462. The case might also have been rested on another ground. The statute involved was designed to protect persons properly on the highway, but not trespassers in adjoining fields who had come to see its provisions broken. There was, therefore, no breach of any duty to the plaintiff. See, in general, 20 HARV. L. REV. 14.

VENDOR AND PURCHASER — RIGHTS AND LIABILITIES — FORFEITURE BY FAILURE TO PAY INSTALMENTS. — The defendant contracted to sell the plaintiff a piece of land, to be paid for partly in cash and partly in monthly instalments. Time was expressly made of the essence, and in case of failure to make any payment as due, all money paid over was to be retained as liquidated damages. It was further provided that in case a suit then pending between the defendant and a third party as to the land in question should terminate in favor of the third party, all payments made by the plaintiff should be returned. Upon the plaintiff's failing to pay three monthly instalments, the defendant declared a forfeiture. Later, the third party won in his suit with the defendant, and the plaintiff brought action for his money. *Held*, that the plaintiff is not entitled to repayment of the instalments paid over. *Jennings v. Dexter Horton & Co.*, 86 Pac. Rep. 576 (Wash.).

The failure to pay the instalments was a material breach, which gave the defendant a right to repudiate. *Axford v. Thomas*, 160 Pa. St. 8. Where time is made of the essence, payments made by the vendor before forfeiture cannot be recovered. *Maloy v. Muir*, 62 Neb. 80; *contra*, *Gilbreth v. Grewell*, 13 Ind. 484. Further, forfeiture nullifies the contract and destroys all liability of either party under it. See *Moore v. Smith*, 24 Ill. 512. No subsequent happenings can affect the rights of the parties. Nor can any obligation of the defendant to refund the payments in case of an unsuccessful termination of his litigation after the default of the plaintiff, be implied from the contract, which contemplated no such contingency. The case, therefore, seems correct, but it illustrates the hard results that follow from the application of the prevalent rules governing forfeiture in this country.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

POWER OF EQUITY TO RESTRAIN FRAUDULENT ELECTION OFFICIALS. — The case of *People ex rel. Miller v. Tool*, decided by the Supreme Court of Colorado in 1904, but only recently reported,¹ held that the state, upon the relation of the Attorney-General, the Governor, and the chairman of the Republican State Committee, could by injunction restrain certain election officials from committing illegal and fraudulent acts, by which they had conspired to steal the forthcoming state election. The defendants' unsuccessful argument against the granting of the injunction rested upon three broad grounds: first, that there was an adequate remedy at law; second, that the question was political and not judicial; third, that equity was asked to restrain a crime. The case has met with so much criticism, from lawyers as well as from partisans, that Mr. Henry J. Hersey, who was of counsel for the petitioners, has attempted in a recent address to defend it. *The Tool Case*.²

¹ 86 Pac. Rep. 224 (Col., Sup. Ct.).

² An address by Henry J. Hersey, of Denver, Colorado, before the Colorado Bar Association at its annual meeting, Sept. 27 and 28, 1906.

Mr. Hersey directs his arguments to the contentions of the defendant as stated. First, he maintains that there is no adequate remedy at law. If such a remedy exists, there was obviously no ground for equitable interference, for it is axiomatic that equity never interferes unless the law has failed to provide an adequate remedy. *Quo warranto*, which was suggested, is available only to determine the title to an office or franchise;¹ *mandamus* will be allowed only for the actual breach of a ministerial duty;² indictment or information would probably not result in a conviction, if at all, until long after the damage to the public had been inflicted. Thus Mr. Hersey seems correct in maintaining that there was no adequate legal remedy.

The address next deals with the contention of the defendant that equity had no jurisdiction because the subject-matter was political and not judicial. The facts involved in the case had never, as the court in its opinion admits, previously been presented for adjudication, and the defendants insisted that this was because it had always been thought plain that a remedy was outside the field of equity, and indeed of the judiciary as a whole. But, as is properly pointed out,³ the absence of previous judicial sanction is not conclusive, inasmuch as the granting of an injunction is, within very broad limits, discretionary, and inasmuch as the shifting conditions of modern life may enlarge even these broad limits. But neither Mr. Hersey nor the court lay any stress on the undoubted fact that where the questions involved have been so long before the courts as those relating to the right of unhampered suffrage, such absence of judicial utterance is a most pregnant circumstance. But what of the broad question raised by this branch of the case? It is often said that courts whether of law or of equity are precluded from deciding any political questions. This seems to mean, however, merely that the judiciary must leave untouched any matter entrusted by the United States Constitution to either of the other two co-ordinate departments.⁴ The protection of the right of suffrage sought in the Tool case is obviously not political in this sense, any more than is the power to naturalize an alien.⁵ The books abound in cases where the courts have protected the right of suffrage. But assuming, as we safely may, that we have here a state of facts which, though involving political considerations, is yet judicial in its essence, it is argued that the court of law, and not equity, should take command. In short, whereas before, the case was said not to be within equity's power at all, here, though within, it is said to be inexpedient for equity to intervene, because it is asked to concern itself with political, and not, as usual, with civil or property rights.⁶ As Mr. Justice Holmes put it recently, "The traditional limits of proceedings in equity have not embraced a remedy for political wrongs."⁷ It may be said in passing that the court, and Mr. Hersey with it, might have been saved the embarrassment of deciding this broad question, for there is very weighty authority for holding that the right to vote is civil rather than political.⁸ But assuming with Mr. Hersey that it is a political question, shall we agree with him that it is a proper field for equity's activity? The case, in answering this question in the affirmative, unquestionably breaks new ground, though Mr. Hersey collects some authorities which he believes involve similar principles. If we once assume that a wrong exists, for which there is no adequate legal remedy, it is hard to see any reason why equity should necessarily decline to make use of its remedy, which is so essentially a matter of discretion. Even if this case is followed, however, it will probably be true that the chancellor will be reluctant to interfere unless the facts are, as here, very strong.⁹ The decision may, then, mark the first venture

¹ High, Extr. Leg. Rem., 3 ed., § 603.

² State *ex rel.* Price v. Carney, 3 Kan. 88.

³ Pp. 16-20.

⁴ See State *ex rel.* Lamb v. Cunningham, 83 Wis. 90, 134, 135.

⁵ 2 Cyc. 113.

⁶ Cf. 1 Pom., Eq. Jurisp., 3 ed., § 131.

⁷ Holmes, J., in *Giles v. Harris*, 189 U. S. 475, at p. 486.

⁸ 1 Story, Comm. on U. S. Const., 5 ed., § 580. See also *Anderson v. Baker*, 23 Md. 531.

⁹ For a good discussion of equity's attitude in such matters, see 1 Spelling, *Injunc.*, 2 ed., § 630.

of equity in the political field. Although it must be recognized to be an innovation, it would be a narrow mind which would, for that reason alone, condemn an apparently beneficial exercise of power.¹

The real difficulty of the case, however, is in regard to the third contention of the defendant, which Mr. Hersey is rather inclined to make light of. The question here is, should the court of equity have kept its hands off because the act enjoined was also a crime? Though, as we have seen, criminal proceedings would at best have afforded the people of Colorado but an inadequate redress, it by no means follows that equity will therefore interfere. Equity's inclination is, to be sure, to right every wrong unprovided for elsewhere. But whereas under our second head no good reason could be adduced why equity should not interfere, here such a reason does exist, — namely, the law's hostility to equity's enjoining any act which is a crime, owing, perhaps, to the historical reverence for the right to trial by jury. It is true that in certain limited fields, such as nuisances, which involve property rights and which equity was enjoining before the passage of our Constitution, the law tolerates equity's concurrent jurisdiction. Indeed, if a new form of nuisance arose, equity might be expected to act. But as interference with the right to vote is so far removed from the type of crime which equity has dealt with, and as it involves no property right whatsoever, the impropriety of equity's taking control seems clear. On this one point, then, the case cannot be supported.

But Mr. Hersey argues further in support of the case: "The state may, when suing in its sovereign capacity, pursue any remedy it chooses, though a private suitor might be held bound to some one remedy."² This statement, however, seems incorrect. It is an enunciation of the English doctrine of prerogative, which, so far as transplanted to this country at all, has been vested in the people speaking through the legislature and not through the courts. The very case on which Mr. Hersey principally relies³ shows that the doctrine is there confined to the proposition that when the people through their legislature pass a statute, for example the Statute of Limitations, they are not thereby to be presumed to legislate the state out of its former powers unless express words are used. But, as the United States Supreme Court has pointed out, general rules of procedure — and under this head the present case seems to fail — apply equally to citizen and state.⁴ Mr. Hersey's doctrine would seem to go to the length of saying that the state could prosecute for murder in equity. It proves too much. There is, then, nothing in the prerogative idea to upset the conclusion previously reached that, though Mr. Hersey is correct in his contention that equity may interfere by injunction where only a political right is involved, yet he is wrong in considering immaterial the added fact that the act enjoined would be a crime.⁵

UNAUTHORIZED AGENTS' LIABILITY ON NEGOTIABLE INSTRUMENTS. — Two elementary problems in statutory interpretation, matters of logic rather than of

¹ For cases the language of which would support the position here taken, see *State ex rel. Cook v. Houser*, 122 Wis. 534, and cases cited; *Boren v. Smith*, 47 Ill. 482. For language leading to the opposite result, see *Fletcher v. Tuttle*, 151 Ill. 41; *Shoemaker v. City of Des Moines*, 105 N. W. Rep. 520 (Ia.).

² P. 7.

³ *Dollar Savings Bank v. United States*, 19 Wall. (U. S.) 227. Cf. *People v. Herkimer*, 4 Cow. (N. Y.) 345; and an excellent note to the case in 15 Am. Dec. 380.

⁴ *Green v. United States*, 9 Wall. (U. S.) 655. See also *State v. Kroner*, 2 Tex. 492.

⁵ A later decision of the Colorado Supreme Court not yet reported (*People ex rel. Graves v. Johnson*, July 2, 1906) holds, by an apparently forced construction of the state constitution, that no inferior court, but only the Supreme Court, may take jurisdiction in a case of this kind. This decision may be indicative of a desire to get away from the disastrous effects which it was generally felt would follow the earlier case.

law, may be put thus. Let us suppose, first, that the common law imposes liability for a certain act. A statute is passed changing this liability if the actor comply with a specified condition. It follows that the old common law liability persists if he do not so comply. We will suppose, again, that the common law negatives liability for a certain act under all circumstances. A statute is passed declaring this non-liability only in case the actor comply with a certain condition. By necessary inference he would seem to incur that liability if he failed so to comply. A recent writer has applied the first of these problems in interpreting a troublesome section of the Negotiable Instruments Law. *Liability of an Agent under the Negotiable Instruments Law*, by L. P. M., 10 Law Notes (Northport) 104 (Sept., 1906). In brief the argument is this. To be negotiable commercial paper must show on its face who is bound, principal or agent. Where this did not clearly appear, judges construed very harshly against the agent until "to escape liability the agent must exclude it."¹ At common law, then, authorized or unauthorized, the agent was bound unless the instrument revealed to the point of self-exclusion that he signed for another. The Negotiable Instruments Law² imposes a different test, that of fair interpretation, but on one condition only. If the agent be duly authorized, the instrument need now only fairly show the representative capacity; but if unauthorized, the writer argues, it must still conform to the canon of the common law which permits escape from liability on the part of the agent if he practically excludes himself.

If the writer's statement of the common law be accepted as accurate, his conclusion cannot be disputed. With his premise, however, issue can be taken. Lord Ellenborough's remark, one not to be taken too seriously, has seemingly blinded him to the current of American decisions.³ True, never did mere *descriptio personae* excuse an agent; but the Negotiable Instruments Law as distinctly enacts the same, — "the mere adoption of words describing him as an agent . . . without disclosing his principal, does not exempt him from personal liability." Our courts have consistently construed these instruments as a reasonable business man would construe them in the light of mercantile usages.⁴ Lord Ellenborough's rule has not found favor. So far as matter of construction well may, the American rule seems admirably codified, — "words *indicating* that he signs for or on behalf of a principal or in a representative capacity."⁵ The statute expresses, not a partial change, as the writer insists, but a partial declaration of the common law. Our first formula has no application to the facts; it is the second that applies. Thus, authorized or unauthorized, the agent was not bound on the instrument at common law if it fairly showed that he signed for his disclosed principal. By the statute he is still not bound if duly authorized. If unauthorized, is he not by necessary implication bound on the instrument, even though he express enough to exclude him at common law? It would so seem, and this view, the writer admits, has been unanimously taken by the draftsman of the act, its critics, its defenders and expositors. Ballou v. Talbot⁶ is *pro tanto* no longer law.

Against this "negative intendment" the writer also invokes the dogma that all statutes in derogation of the common law are to be strictly construed. His dogma is happily obsolescent.⁷ In view of a century's statutory efforts to subvert it, the common law is no longer the something sacred that Coke pronounced it.⁷ "Parrot-like repetition of a false and outworn maxim only hampers benign legislation." The merits of the doctrine under discussion are quite apart from its existence; those who acknowledge it may most regret it. A new remedy

¹ Lord Ellenborough in *Leadbitter v. Farrow*, 5 M. & S. 345.

² § 20.

³ See cases cited in 7 Cent. Dig. § 261.

⁴ *Carpenter v. Farnsworth*, 106 Mass. 561.

⁵ 16 Mass. 460.

⁶ See *The Warkworth*, L. R. 9 P. D. 21; *Chamberlain v. Western Transportation Co.*, 44 N. Y. 305; *Sedgwick, Stat. and Const. Law*, 267 n., and cases cited.

⁷ See *INST.* 282 b, l. 3, § 485.

can hardly be said to be necessary in view of the unauthorized agent's liability for deceit and implied warranty.¹ Nor does parol evidence of authority as a prerequisite to deciding whether any one is bound on the instrument seem in aid of negotiability.²

- ACT OF CONGRESS KNOWN AS THE EMPLOYERS' LIABILITY ACT AFFECTING COMMON CARRIERS IS UNCONSTITUTIONAL AND VOID, THE. *Garrard B. Winston and Blackburn Esterline*. 63 Cent. L. J. 278.
- CAN THE ACCUMULATION OF GREAT WEALTH BE REGULATED BY TAXATION? Affirmative: *Aaron A. Ferris*. Negative: *Alexander Hadden*. 4 Oh. L. Rep. 260.
- CODE OF LEGAL ETHICS, A. Adopted by the Colorado Bar Association for the guidance of its members. Giving rules for the conduct of attorneys in their relations with the bench, jury, clients and witnesses, both in and out of court, and suggestions as to the proper conduct of cases and amount of fees. 6 Brief 212.
- CONSEQUENCES OF A TRUSTEE'S FAILURE TO CONVERT AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN, THE. *Walter G. Hart*. Laying down four rules as governing the distribution of property in English courts in this case. 22 L. Quar. Rev. 285.
- COPYRIGHT BILL, THE. *Charles Porterfield*. Arguing against the bill in its present form. 10 L. N. (Northport) 85, 107.
- EFFECT OF REMARRIAGE IN VIOLATION OF THE ACT OF 1905, THE. *Anon.* A concise but full discussion of the effect of the Illinois Statute prohibiting remarriage of divorced parties within one year of the decree upon remarriage in another state. 33 Nat. Corp. Rep. 37.
- EFFECT OF CORPORATE GREED UPON THE TREND OF RECENT DECISIONS INVOLVING SO-CALLED "VESTED" RIGHTS OF CORPORATIONS, THE. *Anon.* Stating that the trend of such decisions has been inimical to "vested rights," especially in federal courts and as to public service corporations. 33 Nat. Corp. Rep. 5.
- FEDERAL JURISPRUDENCE IN RELATION TO IRREGULAR MUNICIPAL BONDS, THE. *Anon.* Calling attention to the greater tendency of federal over state courts to hold municipalities to their irregular bond issues, when some legislative authority is recited. 31 Nat. Corp. Rep. 97.
- FUTURE INTERESTS IN LAND. I. *Albert Martin Kales*. Applying a classification of future interests as limited by way of succession and by way of interruption. 22 L. Quar. Rev. 250.
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- LATEST CHAPTER OF THE AMERICAN LAW OF PRIZE AND CAPTURE, THE. *Charles Chauncey Binney*. 54 Am. L. Rev. 537.
- LEGAL COMPLICATIONS ARISING FROM GRAND JURY PROCEEDINGS. *F. Beecher*. Discussing how far witnesses are immune from prosecution for slanderous statements made before the grand jury. 63 Cent. L. J. 67.

¹ See *Polhill v. Walter*, 3 B. & Ad. 114; *Collen v. Wright*, 8 E. & B. 647.

² See 14 HARV. L. REV. 247.

- LEGITIMATE FUNCTIONS OF JUDGE-MADE LAW, THE. *Hannis Taylor*. Suggesting that the elasticity necessary to meet advancing conditions has been, and must be, supplied by the judges. 14 Am. Lawyer 400.
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- QUESTIONS OF INTERNATIONAL LAW IN THE DEPORTATION OF ALIENS. *Charles Noble Gregory*. 18 Jurid. Rev. 121.
- REBIRTH OF THE CORPORATION, THE. *Peter S. Grosscup*. Deploring the ownership of corporations by the few, and suggesting a remedy. 31 Nat. Corp. Rep. 104, 127.
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- VALIDITY AND EFFECT OF CONDITIONS ATTACHED TO LEGACIES AND DEVISES AGAINST CONTESTING WILL. *B. B. C.* Collating the law of the various jurisdictions. 10 L. N. (Northport) 128.
- VENDOR'S RIGHT OF RESCISSION, A. *Anon.* An interesting summary of the cases holding that upon the condition of sale enabling the vendor to rescind upon an ejection or requisition being made which he is "unable or unwilling to comply with" should be placed the restriction that the unwillingness shall not be capricious or arbitrary. 50 Sol. J. 493.
- WHEN LAND IS SOLD FOR DELINQUENT TAXES, AND PURCHASER FAILS TO HAVE DEED EXECUTED WITHIN THE STATUTORY PERIOD, WHAT IS THE CONDITION OF THE TITLE? *J. F. Bouchelle*. A discussion of the question as it arises under statute, concluding that the original owner retains title and the purchaser holds only a lien for the amount of taxes. 12 Va. L. Reg. 279.
- YEAR BOOKS, THE. I. *W. S. Holdsworth*. Their history and human side. 22 L. Quar. Rev. 266.

II. BOOK REVIEWS.

NEW ENGLAND TOWN LAW: a Digest of Statutes and Decisions concerning Towns and Town Officers. By James S. Garland. Boston: The Boston Book Co. 1906.

This interesting book on New England town law is of wider interest than its title would seem to indicate. As the author says (p. 83), speaking of the town: "A scheme of local autonomy which has proved itself so well suited to the genius of a great nation, and is so easily adapted to the changing needs of its people, deserves not only the highest praise as an instrument of government, but as an object of study challenges the best thought of students of political institutions."

Examination of the book will show that it is full of materials for the student of our political institutions. It is, so far as the writer knows, the first attempt to gather into one book the town laws of all the New England states; laws copied or imitated throughout the country wherever the town system has been adopted. It is therefore a source book on town laws. An introduction of 83 pages treats of the subject generally, giving an account of the formation of the first settlements in New England towns, townships, or more properly speaking, separate little colonies, by the union of which, under charters subsequently obtained from England, the New England colonies, afterwards states, were the result. In view of the prevailing tendencies of our courts of law to minimize the sphere of town power, it cannot be too strongly impressed upon all that these towns came first and the chartered colony came afterwards. There is no instance in New England of immigration of settlers bringing with them a charter with the intention of forming a colony in the sense of a state, but everywhere the immigrants formed separate little colonies or towns that by coalescence under some charter subsequently obtained from England formed, respectively, the colonies that later became the New England states.

In the history and the political development of these New England towns there is therefore sound historical foundation for the claim that within their own limited sphere, the towns enjoyed a certain limited sovereignty that has disappeared in the limited sovereignty assumed and accorded by the courts to the united colony that afterwards became the state. Mr. Garland does not profess to follow the steps by which the towns have lost their original inherent powers, and indeed the material for such a study does not exist in print. For the process was about completed when the success of the American Revolution gave to the states a legal prestige they had never had before. This process of loss of town power and of gain of colonial legislative power was going on from the beginning of the settlement of the country until the end of the Revolution, but no reports of the decisions of the courts on these questions are in print until the process was about completed at the time when the state constitutions and the United States Constitution were adopted. He who would study this subject must go back of the printed reports of decided cases, and if they are still preserved he must study the records of the unreported cases from 1620 to about 1790.

The work under review treats only of town law as it exists in print, in the revised and general statutes of the New England States. After a general introduction, the work is divided into sections treating of the town laws of each New England state, prefacing each with introductory matter. The section on Massachusetts consists of 158 pages, divided into consideration of laws relating to Assessors of Taxes, Caucuses and Primaries, Collector of Taxes, etc. A section on the town laws of Maine of 151 pages, one on those of New Hampshire of 116 pages, one on those of Vermont of 140 pages, one on those of Rhode Island of 127 pages, and one on those of Connecticut of 119 pages, all similarly subdivided under appropriate heads, complete the volume of nearly 900 pages. For some reason not apparent or explained, the book is not consecutively paged, and there is no table of cases, although many are appropriately cited under the topics discussed. Nor is there any statement of "contents," its place being supplied by an index.

The book will prove to be of value to the practical man and also to the philosophical student of New England town law. The author states both sides of questions that are disputed, leaving the person using the book to come to his own conclusion. This is in accord with the prevalent view that it is no part of the duty of a writer on law topics to point out what he thinks the law should be. There is room, however, for a difference of opinion on this subject.

A. M. E.

THE ELEMENTS OF JURISPRUDENCE. By Thomas Erskine Holland. Tenth Edition. Oxford University Press: New York and London. 1906. pp. xxv, 443.

The two preceding editions of this classical treatise have already been reviewed in the *HARVARD LAW REVIEW*, and little need be added as to the general excellence of the treatise. We may say that Professor Holland's general analysis of the law is rather dictated by historical accidents of growth in the English law than by fundamental legal principle; that his chief division into public and private law is neither required by theory nor useful in practice, being in substance a division between all normal and most abnormal law, on the one hand, and a single branch of abnormal law on the other; and that his use of foreign law for comparison is not of the underlying principles of such law, but of the definitions of speculative writers. But with all said which can fairly be said in criticism of the work, it is easily the clearest, the soundest, and the best of all works on jurisprudence in the English language; and that lawyers and students of law appreciate it as such is shown by its rapidly issued new editions.

In this edition not much has been added to the discussions in the text, but many recent cases have been added to the notes. Important and fundamental questions have been at issue since the last edition. The right to one's livelihood, as threatened by trade combinations (*Allen v. Flood* and *Quinn v. Leatham*) is rather non-committally discussed (p. 180); the quasi-corporate trades union (*Taff Vale Ry. v. Amalgamated Society*) is noticed (p. 333); the tendency of Cape Colony to break away from the strict Roman-Dutch law as to "cause" or consideration for a contract is stated (p. 275). This phenomenon might be recognized as common where the common law and the civil law come into juxtaposition, as in Louisiana and Quebec.

On one point the reviewer wishes to make his protest. Professor Holland mentions the common law as a species of customary law (p. 51). This it seems not to be. The common law took its origin almost, one might say, at a single historical moment — when Henry II, having actually gained general jurisdiction for his judges, instructed them in exercising this new jurisdiction, to apply as law a system of justice which should be based not only upon the general principles of the customary law, but also on equity and justice. The common law from its inception has been based upon principles, not upon custom. It is to be compared in its nature not with the ordinary Germanic folk-law, but to the law administered in the middle ages by the Royal Court of Bohemia, described in *Sigel's Slavic Law*, pp. 72-83. "We remark only in England and Bohemia," that author writes (though he might perhaps have added to the number of examples), "an eager study of legal precedents and the application of scientific methods, worked out by the glossators and commentators, to home law practice." Customary law, properly so called, is of historic interest, but is hardly a fit field for legal science.

J. H. B.

LIMITATIONS OF THE TAXING POWER. By James M. Gray. San Francisco: Bancroft-Whitney Co. 1906. pp. lx, 1316.

The scope of this book is indicated fully by its secondary title: "A Treatise upon the Constitutional Law governing Taxation and the Incurrence of Public Debt in the United States, in the Several States, and in the Territories." The treatment is full and minute; and, as is necessary in dealing exhaustively with a

narrow and specialized subject, the needs of the student are subordinated to the needs of the practitioner. The plan and the execution are well adapted to the purpose in view. Constitutions, the necessary subject matter of the discussion, are adequately quoted. The citation of decisions is not intended to be exhaustive, as the foot-notes sometimes point out; but the citations are certainly numerous enough, covering no less than five thousand cases. The text does not present to an undue extent extracts from opinions, but states without much discussion the effect of the decisions. The result is a book of value to persons interested in the specialty of taxation; and even the reader who cares not at all for this specialty must find interest in the chapters on state taxation in interference with commerce, state taxation impairing contracts, and due process of law. The opening chapter on equality as "The Fundamental Thought in the Constitutional Law of Taxation" gives an unnecessarily unfavorable impression of the author's soundness; for throughout a number of pages it tends to indicate a belief that there is some unwritten constitutional higher law requiring equality, whereas the author in quite orthodox fashion believes, and ultimately expounds, that there is no such unwritten requirement, but that equality is obviously just and desirable, and that consequently constitutions and statutes must be so construed as to attain equality, if such construction be possible. E. W.

PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT. By William R. Anson. Eleventh English Edition. Second American Copyright Edition. By Ernest W. Huffcut. London and New York: Oxford University Press. 1906. pp. li, 462. 8vo.

The new edition of this popular book, as it appears after a lapse of eleven years since the previous edition, does not differ strikingly from its predecessor. The merit of the book consists rather in the clear statements of fundamental principles than in a large collection of authorities or a development of all the applications of these principles. The book seems still the best treatise of its size on the subject, but in a few matters the treatment is unsatisfactory, which is the more important because it has influenced American text writers and students. We may mention especially the treatment of mistake and similar matters, under the head of "Reality of Consent." The distinction, highly important in our law, between mistake which prevents mutual assent at law, and mistake which affords equitable ground for rescission of a contract good at law, is wholly confused. Again, the treatment of the topic of performance of contract under the head of "Discharge of Contract," is unfortunate. The notion that a contract when broken is discharged, and the obligation of a right of action substituted, is distinctly overworked, and the distinction between the plaintiff's only available remedy and his right thereby confused.

The notes of Dean Huffcut, if the limitations of space are considered, are to be commended. The American cases seem well selected, and the comments, though necessarily brief, are frequently suggestive. S. W.

THE LAW OF PASSENGER AND FREIGHT ELEVATORS. By J. A. Webb. Second and Revised Edition. St. Louis: The F. H. Thomas Law Book Co. 1905. pp. xviii, 375. 8vo.

Doubtless such a special book as this has its value to the practitioner who has to deal with a case which falls within its scope. It will save him many days of searching to have the cases bearing upon the subject collected and collated. There is little scope for generalization in making such a book. Negligence in the operation of elevators should be judged by the same standard as in other matters,—due care under the circumstances. The author, however, follows many courts in considering elevators as common carriers. This can hardly be; it is enough to say on that point that service could be refused in any particular case. *Seaver v. Bradley*, 179 Mass. 329.

DIE LEHRE DER RECHTSSOUVERÄNITÄT. By H. Krabbe. Groningen: Wolters. 1906. pp. vi, 254. 8vo.

England, according to Professor Krabbe, is the only country in which the power of the law and of the state have come to coincidence. The statement will appear to many open to considerable question, but is, after all, largely academic. So is in fact the whole volume of the Groningen jurist, who examines the doctrines relating to the sovereignty of the state in various countries and contexts. The value of the book is lessened by the absence of an index.

R. M. J.

A DIGEST OF THE LAW OF TRADE-MARKS AND UNFAIR TRADE. By Norman F. Hesselstine. Boston: Little, Brown, and Company. 1906. pp. xlviii, 378. 8vo.

A SELECTION OF CASES ON EVIDENCE, for the Use of Students of Law. Compiled and edited by John Henry Wigmore. Boston: Little, Brown, and Company. 1906. pp. xxvi, 822. 8vo.

THE LAW OF RAILROAD RATE REGULATION, with Special Reference to American Legislation. By Joseph Henry Beale, Jr., and Bruce Wyman. Boston: William J. Nagel. 1906. pp. lii, 1285. 8vo.

ACT OF STATE IN ENGLISH LAW. By W. Harrison Moore. London: John Murray. 1906. pp. xi, 178. 12mo.

LINCOLN THE LAWYER. By Frederick Trevor Hill. New York: The Century Co. 1906. pp. xviii, 332. 8vo.

ORGANIZED DEMOCRACY. By Albert Stickney. Boston and New York: Houghton, Mifflin & Co. 1906. pp. 268. 8vo.

PROBATE REPORTS ANNOTATED, containing Recent Cases of General Value decided in the Courts of the Several States on Points of Probate Law, with Notes and References. By Wm. Lawrence Clark. Volume X. New York: Baker, Voorhis and Co. 1906. pp. xxv, 709. 8vo.

THE DECLARATION OF INDEPENDENCE: ITS HISTORY. By John H. Hazelton. New York: Dodd, Mead & Co. 1906. pp. vii, 629. 8vo.

THE POWER TO REGULATE CORPORATIONS AND COMMERCE, a Discussion of the Existence, Basis, Nature, and Scope of the Common Law of the United States. By Frank Hendrick. New York and London: G. P. Putnam's Sons. 1906. pp. lxxii, 516. 8vo.

A MANUAL OF THE PRINCIPLES OF EQUITY. By John Indermaur. Sixth Edition by Charles Thwaites. London: Geo. Barber. 1906. pp. xxxii, 597. 8vo.

THE AUSTINIAN THEORY OF LAW, being an Edition of Lectures I, V, and VI of Austin's "Jurisprudence" and of Austin's "Essay on the Uses of the Study of Jurisprudence," with Critical Notes and Excursus. By Jethro Brown. London: John Murray. 1906. pp. xv, 378. 8vo.

FAHNENFLUCHT UND VERLETZUNG DER WEHRPFLICHT DURCH AUSWANDERUNG. Eine rechtswissenschaftliche und politische Studie zu den Deutsch-Amerikanischen Bancroftverträgen. Von Ludwig Bendix. Leipzig: Verlag von Duncker & Humblot. 1906. pp. xxx, 540. 8vo.

PRINCIPLES OF THE ENGLISH LAW OF CONTRACT, and of Agency in its Relation to Contract. By William R. Anson. Eleventh English Edition. Second American Edition, edited with American Notes, by Ernest W. Huffcut. Oxford University Press: New York and London. 1906. pp. li, 462. 8vo.

THE LAW OF INNKEEPERS AND HOTELS, including other Public Houses, Theatres, and Sleeping Cars. By Joseph Henry Beale, Jr. Boston: William J. Nagel. 1906. pp. xviii, 621. 8vo.

THE ELEMENTS OF JURISPRUDENCE. By Thomas Erskine Holland. Tenth Edition. Oxford University Press: New York and London. 1906. pp. xxv, 443.

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NO. 3.

THE LEGAL ASPECT OF MONOPOLY.

MONOPOLY and competition are contrasted so constantly in current discussion as representing opposite and antagonistic business conditions that it is sometimes forgotten that, even under competitive conditions, the aim of each competitor is the sale of his own goods, or the securing of his own services, to the exclusion of those of some one else. Peculiar success, for any reason, of one competitor in the industrial war is a disadvantage, for the time at least, to others, and the reward of the successful is a larger business, increase in size and power to maintain the position already won. For size itself is an advantage in the competitive struggle and an aid to the exclusion of competitors. Not only does it afford greater economy in production and management, but the large concern, operating in a wide territory, can drive out one by one smaller competitors, operating in narrower territory, by simply cutting prices within the smaller field while making a profit elsewhere.¹ This may be a strictly competitive method of warfare, and completely successful from the point of view of the large concern, but it does not insure that the public will receive the best or the most economical service.

Inasmuch as size is in itself an advantage in the competitive struggle, the temptation is to accomplish it, not by the slower and more uncertain process of individual growth through successful

¹ This consideration has led one economic writer to the conclusion that the evils of monopoly can be largely, if not entirely, avoided by merely requiring the large concern to make its prices uniform throughout the territory in which it operates, thus making the undue cutting of prices a greater risk to the large than to the small concern. See *The Problem of Monopoly*, by Prof. J. B. Clark.

competition, but by means of the combination and union in some form of actual competitors. Such a combination not only accomplishes greater size, but at the same time eliminates actual competition previously existing, and thus makes the position of the united interests, for the moment at least, the more secure and powerful. In fact, in organizing such a combination of competitors, the aim generally is to eliminate by means of the combination enough competition so that the united interests will be reasonably safe from such other existing competition as there may be, or, in other words, have a present control of the particular industry or market in which the parties operate. Unless such control is in fact accomplished, size may ultimately prove to be a disadvantage, for the disadvantage of size lies in the fact that it means more to lose. A successful competitor is a greater danger to a large than to a small concern just because of the greater investment which the big concern represents. If economies in management on the side of the large concern are more than offset by newer methods or other advantages on the part of a smaller competitor, then the large concern, which is bound to maintain its position at all hazards, must rely finally upon its power to dominate and control the market, and make use of its size as a competitive weapon to exclude and crush competition which might otherwise prove dangerous to it just because it would be beneficial to the consumer. Its warfare is not waged primarily in the interests of the public, and its success by such means may be the public's loss.

For the purpose of the present article the important point to notice is that monopoly, viewed as size sufficient to give control of the market in a particular trade or industry, may be accomplished in more than one way, though no doubt the method by which most of the large corporations are formed at the present day is by the combination or union of former competitors, and not by individual growth merely. Does the law object to size, control of the market, in itself, or only to particular methods of accomplishing size, or is size not taken into account at all? These are the questions which it is proposed to consider in the following pages. The problem obviously concerns itself primarily with the legality of transactions between competitors, using that word to mean rivals in the same line of business. Starting, therefore, with a consideration of the invalidity, because in restraint of trade, of certain contracts between competitors, an attempt will be

made in the first place to distinguish between contracts of sale between competitors, and contracts for the purpose of regulating and controlling the conduct of their competing interests, before considering finally the legality of a more intimate union of the business of such rivals.

I.

Professor Gray¹ has criticised the position taken by Mr. Justice Holmes in his dissenting opinion in the Northern Securities case on the ground that common law contracts in restraint of trade were contracts which inflicted a detriment upon the conduct of the business of one party for the benefit of the other party, while the cases arising under the Sherman Act which had been already decided by the Supreme Court² had extended the principle to include contracts which had for their object the conferring of benefits upon all the parties to the agreement, and not the infliction of a detriment on the business of some or one of the parties. And his contention was that if these decisions were accepted as binding (and Justice Holmes did explicitly so accept them), then the result arrived at in the Northern Securities case was a foregone conclusion. But even the English authorities³ have not defined contracts in restraint of trade so narrowly as is here stated, and the prevailing view in this country has certainly included in the class of contracts which are invalid as in restraint of trade on common law principles, contracts which limit or restrain competition in some form between the parties, although the object of the contract is to confer a benefit upon the business of all the parties to it⁴

Mr. Justice Holmes, in the opinion referred to,⁵ defines common law contracts in restraint of trade as "contracts with a stranger to the contractor's business (although in some cases carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise

¹ 17 HARV. L. REV. 474.

² U. S. v. Freight Association, 166 U. S. 290; U. S. v. Joint Traffic Association, 171 U. S. 505, and Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211.

³ Hilton v. Eckersley, 6 E. & B. 47; Urmston v. Whitelegg, 63 L. T. (N. S.) 455.

⁴ Stanton v. Allen, 5 Den. (N. Y.) 434; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Nester v. Continental Brewing Co., 161 Pa. St. 473; Craft v. McConoughy, 79 Ill. 346; More v. Bennett, 140 Ill. 69. And see Judge Taft's opinion in U. S. v. Addyston Pipe & Steel Co., 85 Fed. Rep. 271, 288-290.

⁵ 193 U. S., at 404.

he would." This definition suggests another question. It may include other contracts than those merely which inflict a detriment upon the conduct of the business of one of the parties, but, by its terms, it certainly does at least include that kind of a contract. The most common instance at common law of a contract in restraint of trade was a restrictive covenant, in connection with the sale of a business, prohibiting the seller from prosecuting his business in the future in competition with the buyer. Yet such restrictive covenants are now held by the Supreme Court,¹ in a case in which Mr. Justice Holmes delivered the opinion, not to be within the Sherman Act, although that act includes—as has always been insisted by the majority of the court in the different cases arising under the Sherman Act, and as Mr. Justice Holmes again pointed out in his dissenting opinion in the Northern Securities cases—"every" contract in restraint of trade. The result seems to be that, not only is the Sherman Act not directed against those contracts *only* which inflict a detriment upon the conduct of the business of one tradesman for the benefit of another, but the commonest example of such a contract is not within the prohibition of the Sherman Act at all. In other words, contracts which impose only a restriction upon the conduct of business by one party for the benefit of the other may not be contracts in restraint of trade at all, while *all* contracts which impose a restriction upon the business of both parties—limit competition between them in the supposed interests of both—are in restraint of trade and illegal. The reason for this result, and the ground of the distinction between restrictive covenants in connection with the sale of a business and contracts limiting or restricting competition between competitors, have not received the attention they deserve.

II.

It is commonly stated that restrictive covenants accompanying the sale of a business are valid because the limitation upon competition is incidental and collateral to the real object of the contract, which is the sale of business property, and that the restrictive covenant is unobjectionable in so far as it serves to insure the enjoyment of the property sold. Such covenants are not limited,

¹ *Cincinnati Packet Co. v. Bay*, 200 U. S. 179. See also *Brett v. Ebel*, 29 N. Y. App. Div. 256; and for similar decisions under other anti-trust acts, see *Espenson v. Koepke*, 93 Minn. 278; *Gates v. Hooper*, 39 S. W. Rep. 1079 (Tex.).

however, to cases where there is an actual transfer of tangible property. All the business that there is to sell may, in some cases, be the competition, and the restrictive covenant will then constitute the whole of the undertaking. And even where there is a transfer of property the purchaser is not bound to make use of it. It has never been suggested¹ that his right to enforce the covenant was conditional upon his continuous use and employment of the property or instruments of competition purchased. The restrictive covenant protects the *business* sold, not the use merely of particular property transferred under the terms of the sale. It may have been the competition that the purchaser was most desirous of buying, and if the vendor was willing to sell, for the price offered, his power to prosecute his existing and established business, the vendee was entitled to buy it.

Cases involving the sale of a business by means of a covenant to discontinue competition are not unusual. The most common instances have been sales of professional business, where there usually was no property to transfer. The business was all good will,—an established competition. A recent New York case² affords a good illustration of the sale of a business by means merely of an agreement to discontinue competition. In that case one party, in consideration of the promise of the other to make a monthly payment, agreed to give up the business of dealing in moulding sand from sand banks in the county of Albany and not to engage further in the business personally or as agent for any one else. In holding the agreement valid the court says:

“Heretofore, in most of the cases which have come before the courts, the covenant to refrain from a calling within a territory described, accompanied a sale of the business itself, with all its appliances or appurtenances. For obvious reasons that would be so; but, if the calling be one which is followed without a business plant, is any principle of public policy the more violated by a covenant to discontinue it? Clearly not, and this court has not held to that effect.”

¹ Unless possibly in *Western Wooden-Ware Ass'n v. Starkey*, 84 Mich. 76, where it seems to be intimated that the sale of a business, for a sufficient consideration, which involved the abandonment of the manufacturing plant of the vendor, would be invalid. In other words, the owner of a business may not sell out to a competitor unless the purchaser will maintain the identical property used by the seller, though of course the owner might abandon his business if unprofitable.

² *Wood v. Whitehead*, 165 N. Y. 545. See also *Brett v. Ebel*, 29 N. Y. App. Div. 256.

And in the recent case in the United States Supreme Court¹ already referred to, where it was objected that the restrictive covenant was invalid because it was not collateral to a sale of good will, Mr. Justice Holmes used this language:

"It is said that there is no sale of good will. But the covenant makes the sale. *Presumably all that there was to sell*, beside certain instruments of competition, *was the competition itself*, and the purchasers did not want the vendors' names."

It is not accurate, therefore, to say that a restrictive covenant is valid only when and because it accompanies and is collateral to a sale of business property or good will. On the contrary, the restrictive covenant by itself may accomplish the sale of all the business there is to sell, and in every case of a sale of business the restrictive covenant must be regarded as making the sale of a part at least of the business and good will sold. The competitive power of an existing business may be the essence of its good will. A person engaged in business in a particular locality, a physician for instance, located and doing business in a particular town, could not at the same time conduct a second business of the same kind within the same territory which should be in fact a rival and competitor of the first. The opening of a second office for the same purpose in the same town would not mean the beginning of a new business. Consequently, if the whole of such a business, good will and all, is to be sold to another party, the right of the seller to prosecute afterwards what would be, in fact, but a continuation of the business sold, must be excluded.² A covenant prohibiting that would obviously be essential to an actual sale of the business.

As a person could not, before the sale of his business, conduct a second similar business which should compete with the first, it follows that, after the sale of the first business (if public policy does not prohibit a man from realizing the full value of his established business by sale), there is no reason why the seller should be permitted to conduct a second business in all respects like the first. He cannot claim that public policy should permit him to

¹ *Cincinnati Packet Co. v. Bay*, 200 U. S. 179.

² This is so clear that the Massachusetts Supreme Court has held that upon the sale of the business of a physician with its good will a restrictive covenant would be implied. *Dwight v. Hamilton*, 113 Mass. 175. The fact that the courts do not, in the ordinary case of the sale of business property and good will, imply such a covenant, does not mean that such a covenant when made is not, in fact, instrumental in conveying a part of the business of the vendor.

sell his business and keep it too. There can be no doubt that it is this aspect of the matter that has influenced the more liberal attitude which the courts, in the more recent decisions, have assumed toward restrictive covenants in connection with the sale of a business. And in this view of it, it seems clear that the restrictive covenant is no more a contract in restraint of trade than is the simple agreement of a vendor to sell all of the business which he has.

It should seem clear, also, that if a man may sell all of the competition which his existing business fairly represents, there can be no objection, on the score of public policy, to his selling only a part of his business or competition. In the view of the earlier cases, apparently the less sold the better. Certainly a man engaged in business in two places might sell his business or competition in one of them and retain it in the other. The result would be the same as if he had originally had a business only in one place and had sold that, with a restrictive covenant covering that territory, and had immediately resumed business in the other place. And clearly public policy would be no more infringed by the sale of part of a single business which extended throughout both places. Would there be any objection to a contract between competitors whereby one party, in consideration for the agreement of the other party to discontinue business, we will say, in New York, agreed on his part to discontinue business in New Jersey?¹ Would that be a sale of part of a business and valid, or a contract limiting competition and invalid?

As we shall have occasion to see later in discussing contracts limiting competition, the distinction between contracts falling within that class and contracts of sale is not one that is always easily drawn, and the authorities frequently fail to discriminate them properly. Such a leading case, for example, as that of *Arnot v. Pittston & Elmira Coal Co.*,² presents difficulties in this respect that are commonly overlooked. There a Pennsylvania coal company, also doing business in New York, agreed for one season to take at the market price as much as two thousand tons of coal a month from a rival Pennsylvania coal company, provided the vendor would agree during that time not to sell coal to any

¹ Such an agreement was sustained in *Wickens v. Evans*, 3 Y. & J. 318. See Judge Taft's comment in the *Addyston Pipe Company* case, 85 Fed. Rep. 284. And a similar contract was sustained as a sale in *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272.

² 68 N. Y. 558. See also *Mill & Lumber Co. v. Hayes*, 76 Cal. 387.

other dealer to come north of the Pennsylvania state line. The contract was held illegal. It was admitted that an absolute sale of any quantity or of all the coal of the vendor to a rival dealer, even though the object of the purchaser was to secure a monopoly and the vendor knew it, would have been valid. "But — and this is a very important distinction," — says the court, "if the vendor does anything beyond making the sale to aid the illegal scheme of the vendee" the contract is invalid. In other words, the agreement by the vendor to relinquish his competition with the vendee in New York, in consideration for the promise of the vendee to purchase a considerable proportion of the vendor's output of coal — apparently considered a good bargain by the vendor — was invalid and the contract unenforceable. And yet, an agreement to sell all the coal the vendor should produce, said by the court to be valid, would involve a restrictive covenant not to sell to any one else, and would be still more effective to accomplish the monopoly aimed at by the vendee. Apparently the vendor could sell all or a part of his coal and all of his competition, but not a part only of the latter.

Should the fact that the vendee in this New York case was seeking to obtain control of the New York coal market be sufficient to account for the result? If so, then a contract to sell the entire output of the vendor's mines should be invalid for the same reason. This the New York court does not hold, but, in spite of the fact that engrossing the market is repeatedly said to be an obsolete offense,¹ there are a number of recent cases where other courts have refused to enforce, as between the parties, contracts of sale where the object of the purchaser was to obtain control of some particular market.²

These cases apparently rest upon the principle that contracts of sale between competitors, which have for their object the entire or partial removal of a competitor from business, will not be enforced by the courts if the direct result of their enforcement will be to give control of the market to the purchaser. We have seen that a restrictive covenant in such cases is ordinarily as much a part of the contract for the sale of the business as the agreement to transfer tangible property. So long as either remains unexecuted they stand upon the same footing. If, under the circumstances above

¹ *Davis v. A. Booth & Co.*, 131 Fed. Rep. 31, 37.

² *Detroit Salt Co. v. National Salt Co.*, 134 Mich. 103; *Richardson v. Buhl*, 77 Mich. 632; *Pacific Factor Co. v. Adler*, 90 Cal. 110.

indicated, the restrictive covenant would not be enforced, there would be the same reason for refusing to enforce the agreement to sell the rest of the business or property. These cases, therefore, which hold the sale of the property, as well as the restrictive covenant, invalid, where the object of the purchaser is to accomplish control of the market, are consistent at least.

Perhaps the most effective answer to the holding in these cases is, that the validity of each contract of sale must be determined by the character and terms of the particular sale itself, apart from any question as to the situation or intention of the vendee, with which the vendor has nothing to do.¹ Unless all sales between competitors are to be held invalid, there is no sound principle upon which one contract for the sale of the whole or a part of an established business can be held valid, while an exactly similar contract of sale is held invalid for the reason merely that the vendee will thereby acquire control of some particular market. And the moment it is conceded that public policy is not opposed to the sale by any one of all of the business which he in fact owns upon the best terms obtainable, then a restrictive covenant which serves merely to assist in making the sale of that business and its good will must also be held valid and enforceable, whether the object of the vendee be to obtain a monopoly or not.² Such a restrictive covenant is not properly a contract in restraint of trade.³

In the ordinary case of the sale of a business, such as we have been considering, there can be no question of illegal combination as between vendor and vendee. There is no union of their interests; their interests are separate and distinct, if not opposed. But suppose the transaction involves more than a sale, and the relationship of the parties is not that of vendor and vendee merely. Suppose, in other words, that the sale is a part only of the whole transaction between the parties and is carried out in pursuance of some previous understanding or agreement for the combination or consolidation of their interests. What is to be said of the validity

¹ *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 522; *State v. Continental Tobacco Co.*, 177 Mo. 1.

² *Camors-McConnell Co. v. McConnell*, 140 Fed. Rep. 412; *Davis v. A. Booth & Co.*, 131 Fed. Rep. 31, 37. But see *Comer v. Burton-Lingo Co.*, 58 S. W. Rep. 969 (Tex.).

³ This would appear to be the view taken by the New Jersey court in the *Trenton Potteries Case*, 58 N. J. Eq. 519.

In those states, such as Illinois and Ohio, where it is held that a restrictive covenant extending throughout the state is invalid, the result is that where the business does extend throughout the whole state a part of it is unsalable.

of the contract of sale,¹ and of the resulting union of interests between vendor and vendee, in such a case? There can be no successful attempt to answer these questions without first considering carefully the nature of contracts held invalid because limiting competition.

III.

So far we have considered the question of the validity of sales between competitors. Suppose, now, instead of a purchase by one competitor of the business and competition of his rival, the two parties enter into an agreement by which each is bound not to sell goods below a fixed price. This is the typical case of a contract now generally recognized as invalid because in restraint of trade. Why? It is important to consider the circumstances under which such contracts are made.

In such a case as that supposed, it is clear that if there is still a third competitor who is capable of supplying the particular market, then the parties to the contract would be delivering themselves into his hands by carrying out their agreement. In other words, such a contract would not be profitable for the parties, and could not successfully be carried out, unless all competitors likely to prove dangerous were bound by its terms. To take a simple example: suppose two laborers enter into an agreement by which they bind themselves not to work for less than ten dollars a day. Such a contract would have the effect only of depriving the parties thereto of work, and the public would be affected only on that account and to that extent. It would have no tendency by itself to

¹ In *Carter-Crume Co. v. Peurrung*, 86 Fed. Rep. 439, where it was objected that a contract of sale was invalid for the reason that the purchaser was seeking to obtain control of the market, Judge Lurton said: "Another question might arise if all or a large proportion of all the producers of a particular article should agree to sell their entire product to one buyer, who would thereby be enabled to monopolize the market. But, if each independent producer contract to sell his product, or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce, or to have made a contract in illegal restraint of trade. The transaction with *Peurrung Bros. & Co.* was, on its face, legitimate, and it cannot be impeached simply by evidence that the *Carter-Crume Co.* understood and intended it as one step in a general illegal scheme for monopolizing the trade in wooden butter dishes, and controlling prices. The principle, if we admit that the purpose of the *Carter-Crume Co.* was illegitimate, is that which is applied to so-called wagering contracts. The proof must show that the illegal purpose was mutual."

See also *Davis v. A. Booth & Co.*, 131 Fed. Rep. 31, 37, and *Clancey v. Onondaga Fine Salt Mfg. Co.*, 62 Barb. (N. Y.) 395.

raise the level of laborers' wages. Only when laborers enter into such an agreement in such numbers that their services cannot be at once or readily replaced does such a contract tend to raise the level of wages. Consequently the laborers form unions, and do not undertake to regulate their wages by agreements amongst themselves until their numbers are sufficient to warrant such action.

But as the character of the labor increases in skill and the number of competitors decreases, the opportunity by agreement to control prices becomes greater. In *More v. Bennett*,¹ for example, the members of an association of stenographers engaged in court reporting, undertook, by agreement amongst themselves, to regulate the prices to be charged for such work, and the agreement was held invalid and unenforceable, although not all such stenographers were members of the association. Those who were, and who entered into the agreement, possessed, acting together, a control over prices which no one member had alone. As their number increased and the number outside of the association diminished, the greater became their power to regulate prices and the higher could they be made.

The situation as regards employers or manufacturers is the same. Contracts limiting competition are made between competitors who together are in a position to make their agreement to raise prices or limit output effectual and advantageous for themselves without regard to outside competition. A contract between two competitors who could not successfully maintain the prices agreed upon in the face of the competition of other rivals, would be a menace only to the business of the parties themselves.

It is clear, therefore, that a contract between rival manufacturers or traders, which has for its object the regulation or limitation of competition between them,² must be based upon such a present power to control the market as will make their agreement effectual. The purpose of the agreement can only be to make effective the control of the market which the parties already possess, provided the competition existing between themselves is eliminated. The parties enter into the agreements because they are in a position to regulate and control prices, make their agreements effectual, and

¹ 140 Ill. 69.

² Contracts between competitors relating to matters not the subject of rivalry between them would stand upon a different footing. See *Gladish v. Kansas City Live Stock Exchange*, 113 Mo. App. 726.

the courts hold the agreements invalid for that reason, because that is their only object. The question of the reasonableness of the agreements as between the parties, or the reasonableness of the prices agreed upon, has no place in determining the result. The principle is laid down generally that *all* such contracts are invalid as in restraint of trade, and obviously, unless the courts are prepared to determine the reasonableness of prices and charges of all kinds for all competitors, and hold *uniform* prices *reasonable* regardless of differences in the circumstances of competitors, there is no room for discrimination between them. There is no question here which a court can properly investigate and determine, such as is presented in the case of a restrictive covenant which assists in the sale of a business, where the court is concerned only with the character and extent of the particular business sold, and not with the reasonableness of any power to control prices which the vendee may thereby accomplish. An agreement limiting competition could be held reasonable only in case it were fruitless, and did not in fact accomplish that control over prices which was sought.

It should not be forgotten, also, that public policy demands, not merely present reasonable prices, but the continuous working of competitive conditions, and it therefore objects to the suppression of those conditions by an agreement between parties who have it in their power to determine prices in that way. Even public service corporations, which are entitled to charge only reasonable rates and are subject to governmental regulation in that respect, are nevertheless within the general prohibition of contracts in restraint of trade.¹ They may not by agreement substitute monopoly control in the place of competitive conditions which actually exist.

Where competitors, instead of agreeing not to sell below certain fixed prices, undertake to sell only at prices to be fixed by a committee of their representatives,² or form a pool, the agreement is still based upon the fact that the removal of competition between the contracting parties will enable them to maintain and control

¹ *U. S. v. Freight Association*, 166 U. S. 290; *U. S. v. Joint Traffic Association*, 171 U. S. 505.

² *Hooker v. Vandewater*, 4 Den. (N. Y.) 349; *Stanton v. Allen*, 5 Den. (N. Y.) 434; *Craft v. McConoughy*, 79 Ill. 346; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Nester v. Continental Brewing Co.*, 161 Pa. St. 473; *U. S. v. Freight Association*, 166 U. S. 290; *U. S. v. Joint Traffic Association*, 171 U. S. 505.

prices, in spite of such other competition as there may be, as no one of the competitors could have done alone. Unless the parties possess that power of control their agreement is a useless one. But by means of such a contract between parties who already dominate the particular trade or industry, the usual course of competition is arrested in the supposed interests of all, and their control of the market made effectual.

It is clear that in these cases there is no sale of business by one competitor to another. There is no agreement on the part of one party to discontinue his competition so that the business of another may be increased, and no one of the parties, by means of the agreement limiting competition, acquires any business of any one of the other competitors. That is not the object of the contract. On the contrary, the object is to preserve the business of each party by eliminating certain risks of competition. The business of each is continued as before subject to a uniform restriction upon the freedom of competition. There is an abandonment of competition by all, but no abandonment of existing business by any. The purpose of the agreement is simply and solely to eliminate competition between parties who already dominate the particular trade or industry, and substitute in its place an effectual control of the market by those parties, relieved, for the time being at least, from the danger of other serious competition.

A recent case in Alabama¹ illustrates strikingly the object of contracts limiting competition, and indicates the distinction between such contracts and agreements for the sale of the whole or a part of a business. In that case two ice manufacturing companies, who were at the time the only parties engaged in the ice business in the city of Tuscaloosa, entered into an agreement which provided that one of them, in consideration of certain payments to be made from time to time by the other, should close its manufacturing plant for five years, or until sold to a third party. But it was provided that after a certain amount was paid the agreement should be cancelled in case another competitor opened an ice factory in the city.

The contract, it will be seen, did not involve an absolute purchase, or even lease for a definite term, of the business of one of the parties. On the contrary, it was a contract between two

¹ *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110.

competitors who at the time had control of their market for the purpose of eliminating competition between them and giving to both the advantage of the resulting monopoly so long as that monopoly continued. Performance, by the terms of the contract, was conditional upon the maintenance of the monopoly, so that both parties contracted with that object in view. The moment the agreement became disadvantageous by reason of other competition entering the field, it was to be discontinued. The price to be paid made the closing of its plant profitable to the one party, and the other could afford to pay that price as long as it retained absolute control of the market, but no longer. An agreement to raise prices might have accomplished the same result, though perhaps it would have offered greater temptation to others to enter the business.

The case indicates how narrow the line may sometimes be between agreements restricting competition between competitors for the purpose of establishing their control of the market, and the sale of a business by one competitor to another where the object of the purchaser may be to accomplish *for himself* a like monopoly of the particular business.¹ The contract limiting competition is terminated when it no longer accomplishes its object, and each party continues his business as before; but in the case of the sale the transfer of the business of one party to the other is effected once and for all, whether control of the market is in fact accomplished by the purchaser or not.² If the business is transferred and the seller is paid his price, the rest is of no consequence to him, and no room is left for restoring the situation which existed before the sale. And that would be true, it is submitted, even in the case of an agreement which provided that the seller should receive for the sale of his business a share in the profits of the business of the purchaser. But that suggestion leads obviously to the consideration of the question of the legality of a union or combination of competing interests in the form of a partnership or corporation.

¹ See, for example, *Clark v. Needham*, 125 Mich. 84, and *Clemons v. Meadows*, 94 S. W. Rep. 13 (Ky., 1906), cases which are not, at least, clearly reasoned.

² A lease, for instance, which is not by its terms dependent upon the purpose or object of the lessee, is not rendered invalid by the fact that the lessee was seeking to obtain a monopoly. *United States Chemical Co. v. Provident Chemical Co.*, 64 Fed. Rep. 946, 950.

IV.

We have seen that two independent competitors, not in a position to control to some extent the supply of their product, could not, by means of a contract limiting competition between themselves, effectually raise the selling price of the commodity manufactured by them. The contract, so long as adhered to by the parties, could operate only to the advantage of their competitors. These two parties might, however, unite their interests in some form, by means of a partnership, corporation, or other association, and in that way suppress competition between themselves and act together in competition with other competitors. This union of interests might be an advantage to both in the competitive struggle. Increased size is of itself a weapon of competition which is the more appreciated as competition becomes keener and the margin of profit narrower. But the union of two such interests would not give to the combination any greater immediate control over the supply or the selling price of their product than would the contract limiting competition between them as independent dealers.

Suppose, however, parties who have made, and who have been able to maintain successfully, an agreement limiting competition between themselves, unite their interests in a partnership or corporation. The contract, as we have seen, would have been held invalid as in restraint of trade. Would the union of interests of such parties in the form of a partnership or corporation be invalid also, and constitute the partnership or corporation itself an illegal combination?

It should be noticed, in the first place, that, under the common law decisions, the question of whether a corporation was in itself an illegal combination could hardly have arisen. Contracts restraining trade or limiting competition were not unlawful at common law in the sense of being criminal, and did not afford third parties any right of action. They were simply unenforceable.¹ The courts, consequently, never dealt with anything but the validity or

¹ *Hilton v. Eckersley*, 6 E. & B. 47; *Hornby v. Close*, 2 Q. B. 153; *Farrer v. Close*, 4 Q. B. 602; *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, [1892] A. C. 25; *Ætna Insurance Co. v. Commonwealth*, 106 Ky. 864; *Brown & Allen v. Jacobs Pharmacy Co.*, 115 Ga. 429, 437-438; *Queen Insurance Co. v. State*, 86 Tex. 250, 272; *State v. Huegen*, 110 Wis. 189, 251-253; *Howardson v. Coal Co.*, 111 Wis. 545, 549-550; *Live Stock Com. Co. v. Live Stock Exchange*, 143 Ill. 210, 233; *Dickinson v. Board of Trade*, 114 Ill. App. 295, 304; *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271, 279; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 405.

invalidity of some obligation sought to be enforced between the parties before it, and if that was contrary to public policy as being in restraint of trade, the court left the parties where it found them. Courts might refuse to enforce contracts tending to a monopoly, but they did not deal with monopoly as an accomplished fact within the power of a single person or recognized legal entity. If two or more competitors transferred their interests to a corporation, in pursuance of some agreement between themselves, there was an end of that transaction. No court could be called upon afterwards to decide whether that original agreement was valid or invalid, because validity meant enforceability, and there was nothing left to enforce. There could be no question of an agreement in restraint of trade between stockholders as such, who had no other relations with one another and who did not continue in business as individuals. And the corporation did not become a criminal organization merely because it was formed by a union of competing interests, even though it might accomplish the same result as a contract limiting competition between the same parties, which the courts would not have enforced. The contract, like the corporation, accomplished its purpose if carried out.

But the anti-trust acts have in most instances changed the situation in such respects. The Sherman Act, for instance, makes the entering into contracts in restraint of trade criminal, and likewise affords a criminal action against all combinations "in the form of trust or otherwise" in restraint of trade. The question for the courts, under such a statute, is no longer merely one of refusing aid to enforce contracts tending to some particular result on the ground that the object sought is against public policy; the statute makes the contract and the combination in themselves criminal.

The majority of the Supreme Court in the Northern Securities case¹ considered that the result reached in that case was controlled by the decisions in the earlier cases in that court which had arisen under the Sherman Act,² in which contracts limiting competition were held illegal, since it was apparently an attempt to accomplish the same result that was aimed at in those cases, only by a different means. On the other hand, it was objected that such a union of competing interests in a form of organization authorized by law could not be held to constitute an illegal combination without

¹ 193 U. S. 197.

² *U. S. v. Freight Ass'n*, 166 U. S. 290; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505; and *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211.

holding, as a logical consequence, all partnerships or corporations, which necessarily united actual or potential competing interests and limited or suppressed competition to that extent, likewise illegal.

From the examination already made of contracts limiting competition, and the circumstances under which they are made, it is clear that if illegal mergers of competing interests be limited to those cases where the object of the merger is to accomplish a result which could have been attained by means of a contract limiting competition between the parties, then it will not be necessary to hold all partnerships and corporations illegal. Partnerships and corporations may be formed by parties who could not successfully maintain a contract limiting competition, and who could therefore not have had in view the control of any market as the sole or main reason for forming their organization. They may be the result of entirely new enterprise, and not accomplish the merger of any businesses previously established. The step which is taken, therefore, in holding such mergers illegal as accomplish the same result between the parties as could have been, or was already, accomplished by a contract limiting competition between them, does not involve holding all mergers of even existing competing interests in an otherwise authorized form of organization illegal. And it is clear that the Supreme Court does not consider that its decision in the Northern Securities case involves holding all partnerships and corporations illegal combinations. In a later case,¹ involving the constitutionality of the Texas anti-trust act, it was urged by counsel that the act in question made all union of business interests between individuals illegal, and Mr. Justice McKenna, in reply to that contention, says:

“To support the argument the usages and necessities of business are adduced, and partnerships and their effect are brought forward as illustrations. There are some things that counsel easily demonstrate. They easily demonstrate that some combination of ‘capital, skill or acts’ is necessary to any business development, and that the result must inevitably be a cessation of competition. But this does not prove that all combinations are inviolable or that no restriction upon competition can be forbidden. To contend for these extremes is to overlook the difference in the effect of actions, and to limit too much the function and power of government. . . . It is certainly the conception of a large body of public opinion that the control of prices

¹ National Cotton Oil Co. v. Texas, 197 U. S. 115, 129.

through combinations tends to restraint of trade and to monopoly, and is evil. The foundations of the belief we are not called upon to discuss, nor does our purpose require us to distinguish between the kinds of combinations or the degrees of monopoly. It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include a 'condition produced by the acts of mere individuals.' Its dominant thought now is, to quote another, 'the notion of exclusiveness or unity'; in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them. And this concern and the policy based upon it has not only expression in the Texas statutes; it has expression in the statutes of other states and in a well-known national enactment. According to them, competition, not combination, should be the law of trade."

But although it may thus be shown that the logic of the decision in the Northern Securities case does not necessitate the holding of all partnerships and corporations illegal combinations, it is not so easy to apply a test by which to determine what combinations are and what combinations are not illegal. In the case of the contract between independent competitors limiting competition between them, as we have seen, the contract itself by its very existence, and the fact that it is maintained, proclaims a control of the market by the parties sufficient to make the agreement effective. If the parties have miscalculated their power, it is at least a simple matter to terminate the agreement. Neither party in such case would call upon a court to enforce it. All such contracts, therefore, are held illegal because they all have the one illegal purpose. But if all mergers are not to be held illegal, it becomes necessary to distinguish between the good and the bad. The illegal merger does not proclaim itself by its existence merely. The object sought is not always apparent in the fact of merger or in its immediate results. Indeed, we know as a matter of history that some mergers, having for their object the control of some particular market, have miscarried by reason of some miscalculation or unforeseen competition left on the outside. And, as the decisions hold, the fact that the combination has not exercised the power of raising prices, which it in fact possesses, is immaterial if it has the power. The power is the evil thing, and this must in some way be shown to exist.

Admitting, however, that the essential characteristic, both of contracts limiting competition and of illegal combinations, is effective control of the market by the parties — that both contract and in some cases merger are bad because by means of them the parties accomplish that result — then is such control of the market in itself not merely a test in particular cases, but a sign in all cases of the existence of an illegal combination or monopoly, and must all partnerships and corporations be held illegal combinations which can be proved at any time to possess such power of control over the situation in the particular market in which they operate? Or is control of the market in itself of no consequence, and does it become of consequence only when accomplished in a particular way — by means of contract between existing competitors or a union of such competing interests?

It was objected at the time of the decision in the Northern Securities case that in such a case of merger the original illegal agreement between competitors, if there was one, was terminated by the time the scheme for the consolidation of competitive interests was perfected, — the new corporation created and placed in control of the former competitors, — and that thereafter there was nothing to be objected to but the fact that one large corporation did in reality control interests formerly existing in two independent corporations. The new corporation, it was said, could not be an illegal combination because its members were once competitors, particularly where not all of the members of the new corporation were formerly competitors and parties to the original agreement or arrangement. Mr. Morawetz, to avoid that difficulty, has suggested¹ that the only view on which the new corporation, as in the Northern Securities case, can be considered an illegal combination is by regarding the members of that corporation, whether all or any of them were competitors before or not, as becoming an illegal combination by reason of the acquisition of a controlling interest in the two competing companies. This would be an entirely new combination, wholly apart from the earlier one, and the new corporation, legal when formed, would become illegal only upon the acquisition of, and by reason of acquiring, control of the two competing companies.

It may be open to question if Mr. Morawetz's theory really avoids the particular difficulty which suggested it, inasmuch as the

¹ The Anti-Trust Act and the Merger Case, 17 HARV. L. REV. 533.

new corporation would continue to be an illegal combination, subject to attack on account of the original purchase, in spite of subsequent changes in its membership and in the operation or extent of its business. But, in any event, if it is true that a corporation which acquires the control of two competing companies thereby becomes an illegal combination, then why does that result not follow from any purchase by one corporation of the business of another? In such a case the stockholders of the purchasing corporation have combined to remove a competitor from the field and leave only one in the business to control the two properties, and if that constitutes the purchasing corporation an illegal combination, then all sales of business by one competitor to a competing partnership or corporation would involve that result, and no sale to such a purchaser could be valid. The sale itself must be against public policy, if that alone is to make the purchaser an illegal combination. It cannot be legal for the seller to sell, and at the same time illegal for the buyer to buy. But we have already seen that not all sales between competitors are invalid, and that the better view, and the tendency of the most recent cases, is to hold such sales not invalid even when the purchaser may thereby acquire control of the market. Not the sale, therefore, in any event, could constitute the purchaser an illegal combination, but such a result must follow, if at all, from the fact of the purchaser's actual control of the market; and the sale would be looked to only for the purpose of establishing that fact.

Does control of the market, then, by itself, constitute the corporation shown to possess such control an illegal combination? In *Whitwell v. Continental Tobacco Company*,¹ the Circuit Court of Appeals for the Eighth Circuit held, in a case arising under the Sherman Act, that a corporation, which was admitted to control almost the entire market of the country in certain particular lines of goods, might legally refuse to sell customers upon profitable terms unless they would contract for all their requirements and agree not to buy competing goods of competitors. That an action for damages under the Sherman Act could be maintained on account of such a refusal to sell by a combination of competitors is shown by a still more recent decision by the Circuit Court of Appeals for the Ninth Circuit,² and the court in the Tobacco case

¹ 125 Fed. Rep. 454.

² *Ellis v. Inman, Poulsen & Co.*, 131 Fed. Rep. 182. See also *City of Atlanta v. Chattanooga Foundry & Pipe Works*, 127 Fed. Rep. 23.

admits that if a combination of competitors had been shown to exist in that case the result would have been different. The decision, therefore, of the same court which first decided the Northern Securities case is that substantial control of the market does not of itself constitute a corporation an illegal combination.

But if not all partnerships and corporations which have control of some market are illegal combinations, and if the sale of a business by one competitor to another is not illegal and does not of itself constitute a purchasing corporation an illegal combination, even though the purchaser may thereby acquire control of the market, how is it to be determined what combinations are and what combinations are not illegal? That must depend, apparently, upon the facts and circumstances surrounding and determining the origin of the particular combination. There appears to be no escape from that conclusion. To be illegal, the combination must rest upon an understanding or agreement between actual competitors who, by removing competition between their established independent enterprises, are able at the time to control the market or industry in which they are engaged. A sale by one rival to another is one thing; but an agreement between competitors to surrender control over their properties and transfer them to one and the same corporation or organization, where each transfer is conditional upon a similar transfer by each of the other competitors and parties to the arrangement, and where the consideration for each transfer is the acquirement of an interest by the seller in the new organization which will have control of all the former competitors, is a different thing. This arrangement may be effectuated by means of a sale (a sale of stock, as in the Northern Securities case), but there is something more than a series of independent sales.

The result is that where competitors enter into an illegal agreement or undertaking to eliminate competition between themselves, and give to their united interests an effectual control of the market in which they operate, the whole transaction by means of which that object is accomplished is illegal. It may be enjoined at the outset,¹ and if carried out, the combination which results is an illegal monopoly.² The explanation of this result of the cases appears to be that public policy, as expressed in the statutes, aims to se-

¹ *Harding v. American Glucose Co.*, 182 Ill. 551, 599.

² *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448; *Bishop v. American Preservers' Co.*, 157 Ill. 284; *National Lead Co. v. Grote Paint Store Co.*, 80 Mo. App. 247; *Northern Securities Co. v. U. S.*, 193 U. S. 197.

cure the preservation of the competitive system, and increased size sufficient to give control of the market which is the result of success in the competitive struggle, the constant and continued aim of each competitor, cannot, at a certain point, be held illegal without depriving competition itself of its incentive. But, on the other hand, to allow size which gives control of the market to be accomplished, not through successful individual competition, but through the method of agreement or union between competitors, is to destroy at one stroke competition as it then exists and substitute a present monopoly in its place.

V.

Such seems to be the conclusion of the matter in regard to illegal combinations from the cases as they now stand. Necessarily, the only remedy which will terminate an illegal combination in the form of a corporation is some order, such as was entered in the Northern Securities case, aiming at the destruction of the power of control which the combination of competitors has established. Any attempt to restore the exact situation existing before the combination was formed would in most cases be impossible, and the parties themselves cannot claim such restoration as a matter of right.¹ Nor would it be possible in most cases to resolve the combination into its original competing elements. The two railroads in the Northern Securities case retained their identity as railroad properties, and the original corporations continued in existence;² but in the case of many consolidations the old corporations go out

¹ *Harriman v. Northern Securities Co.*, 197 U. S. 244. For a case suggesting that the state might compel a reconveyance of the properties sold, see *State v. Chemical Co.*, 71 S. C. 544.

² The Northern Securities decision does not rest, however, on the ground merely that the new company acquired and held the stock of the Great Northern and Northern Pacific Railroad Companies, and that only in the case of such a holding company (the identity of the original competitors continuing to be distinct) would the transaction be declared illegal. On the contrary, Mr. Justice Harlan emphasizes the fact that the new corporation had complete control of the situation for all purposes, and that the transaction was illegal *because* the union of interests was as effectual as if both lines of railroad were "held in one ownership," and because "the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, *one powerful consolidated corporation*," etc.

In other words, the holding company is an illegal combination because it has as complete control of the competing interests as a single corporation which should take the place of both of the others upon their dissolution. It is not illegal merely because it

of existence, and the original competing properties may be completely modified and some entirely abandoned. In any event, the court could not compel the parties to resume a competition which had been abandoned. Obviously, under such circumstances, all that the court could do would be to attempt to destroy the power of control over prices or rates which the union of competitive interests had accomplished by enjoining the continuation of the particular combination. If the corporation could show when attacked that it did not possess any greater power to control prices than was possessed by some one of the original competitors, apparently no relief could be had against it. Evidently the merger did not have greater control over prices for its object, or that object was not accomplished, or the power had since been lost, and no evil requiring a remedy remained.

And in the case of most consolidations, particularly of industrial corporations, where the conditions of business are more or less unstable, subject constantly to the uncertainties of new and improved methods and other unexpected developments, the exact situation as it existed at the time of the combination is quickly left behind. Monopoly, or control of the market in the view here considered, is necessarily an entirely relative matter. A particular combination may obtain greater power of control over the market than was possessed by any one of the united competitors before the union, but just so may a single successful business advance from time to time its situation in the market and increase its power to determine prices. It is a matter of more or less from time to time, and conditions as they existed before a union of competing interests cannot long serve, in many lines of business, as a standard of comparison by which to determine the degree of control over prices possessed at a subsequent time by the particular combination. A union of competing interests in the form of a corporation may acquire the power to fix prices in the same way that they could have been determined by contract between the competing parties, but, just as in the case of an absolute sale by one competitor to another, the consolidation accomplishes more than that. The contract limiting competition or fixing prices has only that for its object, and its termination carries nothing else with it. But the corporation has a right to exist unless illegality has been its essential characteristic

is a holding company. Some holding companies, as well as some other corporations, may not be illegal combinations. If two corporations may lawfully unite their interests, there can be no objection to their doing so by means of a holding company.

from the beginning. In what period of time, or through what change of circumstances, may a union of competing interests in the form of a corporation hope to be born anew and escape the danger of suffering dissolution on account of its original sin?

Furthermore, if the distinction between valid sales of business between competitors and illegal combinations is to be maintained, a further difficulty is presented in the case of those consolidations which are a compound of sales and combinations. In the organization of many of the industrial trusts there is an absolute purchase and sale of some plants, and what may strictly be a union or combination of interests in the case of others, but any substantial control of the market may not be accomplished without the properties purchased. If neither the combinations nor the sales, considered separately, are illegal, what is to be said of the final result?

Suppose that three wealthy men should agree each to purchase a controlling interest in one of three competing companies which dominated or controlled the market in some line of business, and should bind themselves to unite their separate interests subsequently by means of a partnership or corporation. There can be no doubt that the agreement would be illegal, and that the resulting corporation would be an illegal combination within the meaning of the authorities. Would the result be different if the partnership or corporation were first formed, with the same ultimate purpose in view, and its combined capital employed in the purchase one by one of a controlling interest in the three competing companies? The separate sales in either case might be perfectly valid, the different vendors having no part in the combination; but might not the men who combined their capital to accomplish the combination of existing competing interests be held, in the second case as well as in the first, to be parties from the beginning to an illegal combination? Such a combination would certainly fall within the prohibition of such statutes as the Texas anti-trust act, which defines a trust as a combination of capital, skill, or acts by two or more persons, corporations, etc., for the purpose of suppressing or lessening competition. The corporation would be an illegal combination from the beginning, because formed for an illegal purpose — to secure a monopoly by means of a union of competing enterprises.

It would follow, also, that a corporation formed by a combination of part of the competitors in a particular line of business, with the intention that the combination should purchase the

business of enough of the remaining competitors to enable it to dominate the market, would also be an illegal combination from the beginning. And so in the Northern Securities case both the Circuit and Supreme Courts held that the Northern Securities Company was from the outset, and prior to its purchase of control of the two railroad companies, an illegal combination.

This view, as was shown in discussing Mr. Morawetz's contention, does not involve holding that a corporation, legal when formed, will become an illegal combination if, in the course of its business, it purchases a competing enterprise, even though such purchase may give it for the time being a substantial monopoly. The line is drawn between combinations formed for the purpose of securing a monopoly by means of the union of existing competing interests, and monopoly which is the result of the growth or development of a single business, whether carried on by an individual or a corporation. If, in the case of every business enterprise, conspicuous success in the competitive struggle were to result only in illegal monopoly, the value of the competitive system would be impaired.

It is clear, however, that some monopolies must be tolerated unless all roads leading to monopoly are closed. If that cannot be done without interfering with the ordinary methods of competition, then the only course left is, not to prohibit altogether size which gives control of the market, but to restrict the uses which may be made of size and limit the competitive power of size to perpetuate itself regardless of the interests of the general public. The success of a competitor, where competition is still active, is the gain of the purchasing or consuming public. But success which is so secure that the public may be disregarded must be controlled. The competitive system is maintained, not merely for the benefit of the successful competitor, but to serve the welfare of the whole community. The public is interested, not in the success of any one competitor, but in the continuous and effective operation of free competition, active and potential. When such restraining influences are no longer effective, so that the interests of the successful competitor and those of the public no longer correspond, the public interests must be protected in some other way. It may then become necessary by means of legislation to control the power and regulate the conduct of all large corporations, no matter what their past history.

Herbert Pope.

SEVERAL PROBLEMS OF GRAY'S RULE AGAINST PERPETUITIES, SECOND EDITION.

GRAY'S Rule against Perpetuities is entitled to more attention than is usually given it by the mere reviewer. Its discussion of problems in the law of future interests is, it is believed, such as to call for articles dealing in some detail with the learned author's treatment of particular topics.¹

VESTED AND CONTINGENT REMAINDERS.

It is believed that Professor Gray's exposition of the distinction between vested and contingent remainders² is capable of some further development.

We are told in § 100 that "the word 'vested' had originally no reference to the absence of contingency." This indicates at once that vested remainders must include remainders which are not subject to a condition precedent and some that are; while contingent remainders include only a portion of those which are subject to a condition precedent. Then in § 101 we are brought face to face with this definition of a vested remainder: "A remainder is vested in A, when throughout its continuance A, or A and his heirs, have the right to the immediate possession whenever and however the preceding estates may determine." What is the reason for this definition? Surely it is not supportable from any purely modern point of view. Is its origin to be referred, then, to the feudal system of land law? It is submitted that Mr. Gray might at least have hinted at the answer to this question and suggested the reason upon which his definition was based.

Having started, however, in this somewhat abrupt fashion, the learned author seems to fall away from his own premises. In § 104 he puts the case of a gift "to A for life, remainder to B and his heirs, but if B dies before the termination of the particular estate, then to C and his heirs." Of course the remainder to B is, by his definition, vested, though actually subject to a condition

¹ Upon the appearance of the first edition a very considerable discussion arose in one of the leading English Reviews over the question whether possibilities of reverter had been held to exist after the Statute of *Quia Emptores*. See 3 L. Quar. Rev. 399.

² §§ 100-108.

precedent to its taking effect in possession. B and his heirs stand ready at all times during the continuance of B's interest — that is, so long as there is any chance of its ever taking effect in possession — to come into possession whenever and however the preceding interest determines. Yet in § 105 the learned author intimates that “if the law looked on vested and contingent interests with an impartial eye, it would seem that such remainders should be held contingent. . . . But the preference of the law for vested interests has prevented this view being adopted.” This is confusing. If he means that from the modern point of view the remainder ought to be held contingent, he is correct; but his original hypothesis is that the distinction between vested and contingent remainders is not a rational one from the purely modern point of view. The statement that the preference of the law for vested interests makes it vested, implies that it is held vested as the illogical relaxation of a general rule by which it would be contingent; whereas the fact is that the result is according to the general rule of law (doubtless of feudal origin), and is no doubt entirely consistent with the principles and reasoning upon which that rule was founded, — whatever they may be.

In §§ 106 and 108 Mr. Gray does not make clear the application of the definition of a vested remainder which he announces. In § 106 he puts the case of a devise “to A for life, remainder to his surviving children,” and deplores the rule of some cases in Illinois and other states, which he says would make this remainder to the surviving children of A vested. He fails to observe that the children take a vested interest or not, by the application of his own definition, according as you construe the testator's meaning to be that the children shall literally survive A, or that they shall survive the termination of A's life estate, no matter how or when it may determine. If you accept the latter meaning, then the remainder is ready throughout its continuance (for it has a continuance so long as there is a possibility that it may take effect in possession) whenever and however the preceding estate determines. The fault of a case which held the remainder vested in the children of A in the above case would not necessarily be that it changed the definition of a vested remainder. It might be that it only departed from the construction of a contingency which generations of judges have clung to and approved.

In § 108 the learned author does not seem to stand by his definition of a vested remainder. He there announces the test by which

it is to be determined when a remainder which is subject to a condition precedent to its ever taking effect in possession is to be regarded as vested or contingent. He says it all depends upon the form of the language used. "If the conditional element is incorporated into the description of, or into the gift to, the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus, on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent." One may fairly ask why the learned author makes the test the mere form of words, when his own definition furnishes a sufficient foundation for the distinction which he wishes to draw. In the first case put, the remainder to the children of A is vested, because clearly enough during its continuance—that is, so long as it has a chance of taking effect at all—it stands ready to come into possession whenever and however the preceding estate may determine. So in the second case put, if the gift to the children of A who survive him be construed as a gift to the children of A who survive the termination of A's life estate, whenever and in whatever manner it may occur, it is no different in substance from the first case, and should, according to Mr. Gray's definition, be a vested remainder. The proper construction, however, of the limitations to the surviving children of A in the second case is that they must literally survive A's death. In such case Mr. Gray's definition of a vested remainder will not apply, and the remainder is contingent.

Mr. Gray states in §§ 106 and 107 the New York statutory definition of a vested remainder. He indicates also some cases where apart from statute that definition seems to have been adopted. He fails, however, to make the discrimination that in some of these where results were actually reached different from those which would have been obtained by applying the common law, the only question was whether the remainder was alienable by deed without covenants. This is most strikingly true of the leading case in Illinois, *Boatman v. Boatman*.¹ This definition

¹ 198 Ill. 414. See also *In re Haslett*, 116 Fed. Rep. 680; *Forsythe v. Lansing*, 109 Ky. 518. So in *Chapin v. Nott*, 203 Ill. 341, the question was whether a remainder subject to a condition precedent that the life tenant die without issue, could descend upon the death of the remainderman. Clearly it could by the common law. The court,

of a vested remainder may therefore be merely an indirect way of causing, without the aid of statute, contingent remainders to be alienable *inter vivos*, — a most enlightened piece of law reform. These cases perhaps should be regarded as establishing only the proposition that a future interest after a particular estate of freehold limited to a person ready and entitled to take possession as remainderman should the particular estate then determine, — although, should the particular estate determine at some other time, such person might not be entitled to the remainder, — is alienable by deed without covenants. Mr. Gray's explanation entirely fails to bring this out, and the reader therefore is left, it is submitted, in far worse confusion than need be.

Cases may be found in Illinois where remainders which are vested according to the common law definition as set out in Gray's Rule against Perpetuities and by the New York statutory definition as well, are called contingent because they are subject to a condition precedent in fact. Thus, where the question is as to whether the holder of a future interest may file a bill for partition, the rule is that he cannot unless his future interest is absolutely sure to take effect in possession some time. If it is uncertain ever to take effect, no partition may be had. This rule is discussed in terms of vested and contingent remainders. Accordingly, where the limitations are to A for life, remainder to B and his heirs, but if B dies before the termination of the particular estate, then to C and his heirs, we find the court, for the purpose of determining whether B's interest is subject to partition or not, calling B's interest a contingent remainder.¹

however, held that it descended because the remainder was vested under the doctrine of the Boatman case.

It should be observed, also, that the New York case of *Moore v. Littel*, 41 N. Y. 66, which seems to have established, by virtue of the New York statute, this new definition of a vested remainder, raised only the question of whether the future interest was alienable *inter vivos* or not. The New York court held it was, because under the New York statute it was vested. This, it has been pointed out by Mr. Stewart Chaplin (1 Colum. L. Rev. 279), was the precise point involved in many cases which have cited or followed *Moore v. Littel*, *supra*. It may be, therefore, that the true function of the New York statute is indirectly to allow the transfer of all future interests so long as they fulfill the statutory definition of a vested interest. It should be treated, perhaps, as an indirect mode of abolishing all the irrational and absurd results which have come down to us from the feudal period of the land laws and have attached to interests known at common law as contingent remainders, — namely, their non-alienability and possibly their destructibility.

¹ *Seymour v. Bowles*, 172 Ill. 521; *Goodrich v. Goodrich*, 219 Ill. 426, 1 Ill. L. Rev. 184; *Ruddell v. Wren*, 208 Ill. 508; *Cummings v. Hamilton*, 220 Ill. 480, 483, *semble*.

In short, it is believed that looking at it from the point of view of vested and contingent interests, the law in single jurisdictions may, as it does in Illinois, appear a perfect chaos. No order can come out of it unless one starts with the premise that fundamentally there was a common law or feudal distinction between vested and contingent remainders; that this was and may still be useful in connection with certain results; that in connection with other results the mere distinction in words may take on an entirely different character in substance.

The vital question, however, for the writer on the subject of the rule against perpetuities concerns the proper definition of a vested interest to be used where the application of the rule against perpetuities is involved. Is a state having a non-statutory rule against perpetuities, but adopting the New York statutory definition of a vested interest when the question is one of alienation *inter vivos*, going to apply that definition where the question is whether the rule against perpetuities is violated? Thus, suppose a limitation to A for life, and if A die without issue in any generation to B and his heirs. A is a bachelor. We will assume, also, that contingent remainders are no longer destructible. Under the New York statutory definition B would have a vested remainder.¹ Is his interest therefore not void for remoteness?² Is a state like Illinois, which has a rule that the future interest is vested for the purpose of involuntary partition only when it is not subject to a condition precedent in fact — *i. e.*, when it is absolutely sure some time to come into possession — going to apply that definition when the question is whether the rule against perpetuities is violated? If so, it may make a difference in a case like this: to A

¹ Chapin *v.* Nott, 203 Ill. 341.

² It is assumed in accordance with the reasoning of some recent cases abolishing the Rule in Wilde's Case, 6 Co. 17 (Davis *v.* Ripley, 194 Ill. 399; Boehm *v.* Baldwin, 221 Ill. 59), that the gift after an indefinite failure of issue in the life tenant does not turn the life estate into an estate tail, where estates tail have been long since abolished by statute and turned into life estates with remainders in fee to the life tenants' lineal heirs.

Observe, also, that the case put in the text exists in Illinois where an estate tail is limited to A and the heirs of his body, and the remainder in fee to B and his heirs. In such a case the Statute on Entails (Rev. Stat. 1874, c. 30, § 6) gives A a life estate with a remainder to his lineal heirs. B would, it is submitted, have a fee simple taking effect on the contingency of an indefinite failure of issue in the life tenant. See Chapin *v.* Nott, 203 Ill. 341; Growt *v.* Townsend, 2 Hill (N. Y.) 554, 2 Den. (N. Y.) 336.

It should be noted that Missouri (Rev. Stat. 1899, § 4592), Arkansas (A. & H. Dig. Stat. 1894, c. 29, § 700), Vermont (Stat. 1894, c. 105, § 2201), and Colorado (Mill's Ann. Stat., vol. 1, § 432) have a statute on entails similar to that in Illinois.

for life, then to the unborn son of A for life, remainder to B and his heirs, but if B or his issue do not survive the termination of the unborn son's life estate, then to C for life. Here the remainder to B is in fact subject to a condition precedent to its taking effect in possession, which may occur at too remote a time. If, therefore, it be regarded as not vested and the rule be held to apply, the remainder to B will be void for remoteness, and under *Moneypenny v. Dering*¹ C's life estate will fail. These fundamental difficulties the learned author of the Rule against Perpetuities fails even to open to our view.

VESTED AND CONTINGENT INTERESTS AFTER TERMS FOR YEARS.

When is a freehold interest limited after a term vested? This is a vital question, because, as is pointed out in §§ 209 and 210, however long the term may be, the limitation after it is valid if vested. It is believed, therefore, to be a serious omission in the chapter on vested and contingent interests that this question is not discussed. In fact, in no place in the book is it considered.

Shall we assume, then, that a freehold interest after a term is vested when such a future interest after a freehold would be? If so, the freehold after the term is vested in A, when throughout its continuance A, or A and his heirs, have the right to the immediate possession whenever and however the preceding term may determine. Such a view certainly is consistent with *Smith d. Dormer v. Parkhurst*.² If this be the correct view, then we may have interests after a very long term for years which are in fact subject to a condition precedent to taking effect in possession, but which must be called vested. Are they, then, not subject to the rule against perpetuities? Thus, to A for ninety-nine years and then to B and his heirs, but if neither B nor any of his lineal descendants from him survive the termination of said term, then to C for life. Here B's interest is in fact subject to a condition precedent to its ever taking effect in possession. Is it then vested and not too remote? Where *Moneypenny v. Dering*³ is law, on the answer to this question will depend the validity of the gift to C for life. So, if

¹ 2 DeG. M. & G. 145.

² 3 Atk. 135; 5 Gray, Cas. on Property, 55; *Fearne, C. R.*, 220; *Challis, Real Property*, 2 ed., 133-136.

³ *Supra*.

the limitations are to A for ninety-nine years and then to B and his heirs, but if the said term shall terminate before the expiration of said ninety-nine years, then to C and his heirs, is C's interest too remote?

STATEMENT OF THE RULE AGAINST PERPETUITIES.

In the first edition the rule against perpetuities was given in this form: "No interest subject to a condition precedent shall be good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." As Mr. Gray now, in the second edition, points out, this is only correct "if we assume that 'condition' includes not only all uncertain future acts and events, but also all certain future events with the exception of the termination of preceding estates." By this assumption the rule as stated applies to certain executory interests, — as where the limitations are to A and his heirs to begin from a day fifty years after the testator's death. Even then, however, the statement of the rule is believed to be defective, because there may be some future interests which are in fact subject to a condition precedent in the sense of an uncertain future act or event, which would not be too remote because by the common law definition they were *vested*. Thus, suppose the limitations are to A for life, then to the unborn son of A for life, remainder to B and his heirs, but if B or his issue do not survive the termination of the life estate in the unborn son, then to C for life. Here the remainder in B is, by the common law definition, vested,¹ yet it is in fact subject to a condition precedent to its taking effect in possession which may occur at too remote a time. Nevertheless, because the future interest is vested it may be supposed that it is not void for remoteness.

The fact that with respect to future interests there are today several distinct meanings of the term "vested" variant from that which obtained at common law, suggests a criticism of the statement of the rule as now set out in the second edition. In that statement the future interest is required to "vest" within the required time. With at least three different meanings of "vest,"² all of which are in use in a state like Illinois, and doubtless in other jurisdictions to some extent, how can such a statement of the rule against perpetuities be of the slightest value until the

¹ Gray, *Rule Perp.*, 2 ed., § 108.

² See *supra*, pp. 192-195.

sense in which "vest" be used is defined. However it might be with the casual reader, it would not, it is believed, be difficult for one having a more intimate acquaintance with the scope of Mr. Gray's book to surmise that by "vest" the learned author means "take effect in possession," or "come into a position with reference to a preceding estate less than an absolute interest where the future interest is ready, during its continuance, to come into possession whenever and however the preceding interest determines, otherwise than by being prematurely cut short by the express provision of the settlor." Curiously enough, this is just the definition of "vest" which is no longer much understood and which is ceasing to be in common use. Why not, then, discard the word "vest" and state the rule thus: No interest is good unless it must come into possession, if at all, not later than twenty-one years after some life in being at the creation of the interest; except that if the interest, whether in real or personal property or by way of equitable interest in real or personal property, must, if at all, not later than twenty-one years after some life in being at the creation of the interest, stand ready throughout its continuance to come into immediate possession, whenever and however a preceding interest less than an absolute interest may determine, otherwise than by being prematurely cut short by the express provision of the settlor, it is valid.

DOES THE RULE APPLY TO CONTINGENT REMAINDERS?

There is another problem that the critical reader may well ask for more light upon. It is stated, as we have just seen, to be one of the fundamental assumptions that the rule against perpetuities does not apply to remainders which are vested in interest, no matter at how remote a time they may vest in possession.¹ Yet, as to all future interests in land which are executory, they must vest in possession within the prescribed time, — or, as it is often stated, they do not vest in interest until they vest in possession. Why is this? One searches in vain in the present edition, as well as in the first, for an answer. The truth is that Mr. Gray may have placed himself in a position where it is difficult for him to argue about this matter. He has taken the position that a contingent remainder is subject to the rule. The main affirmative ground for this, he states²

¹ §§ 205 *et seq.*

² § 284.

to be that, "as the rule governs all contingent equitable limitations of real estate, and all contingent limitations, legal and equitable, of personal property, whether in the form of remainders or not, it is very desirable that legal contingent remainders of real estate should be subjected to the rule also." Suppose, then, the limitations are to A for life, then to the unborn son of A for life, remainder to B and his heirs, but if B or his issue do not survive the termination of the unborn son's life estate, then to C for life. Here the remainder in B is by the common law definition vested, yet it is in fact subject to a condition precedent to its taking effect in possession which may occur at too remote a time. It is a future interest which is both vested and contingent. Does the rule apply? If it does, then under *Moneypenny v. Dering*¹ C's life estate will fail. If it does not, then C's life estate is valid. If the reason why the rule applies to contingent remainders be sound, then the same reason will cause it to apply to vested remainders which are in fact subject to a condition precedent, and the learned author should have given us some further exposition of the vested remainders which are subject to the rule against perpetuities and those which are not. The fair inference is that he would say that the rule would not apply to the vested remainder in the case put, simply because it was vested. The only distinction, however, between the vested-contingent remainder and an executory interest is the purely historical one, that by the common law or feudal system of land law the future interest of the vested-contingent remainder type was valid and recognized as such long before any rule against perpetuities arose. That is the *accident* which caused the rule not to apply. Whether this reasoning be progressive or unprogressive, logical or illogical, it is exactly the same reasoning, exactly the same accident, which enables one to say that the rule against perpetuities does not apply to contingent remainders. It is believed, therefore, that the learned author's statement that the rule does not apply to vested remainders and that it does apply to legal contingent remainders, while in a sense, perhaps, correct, since contingent remainders have become indestructible, is susceptible of some further elucidation.

¹ 2 De G. M. & G. 145.

VESTED GIFTS TO A CLASS AND THE RULE AGAINST PERPETUITIES.

In § 121 b is supposed the case of an immediate vested bequest to the grandchildren of A, a living person, to be paid them at twenty-five. A has one grandchild *in esse* at the testator's death, who is three years old. Is there a valid gift to that grandchild? The learned author answers this question in the affirmative, but upon what ground is still far from clear.

The actual language used to explain the result was this: "Here the number of the class may not be determined till too remote a period, the rule against perpetuities will be violated, and the gift to a class which may be so constituted will be bad; there is, then, no reason for sustaining the direction to postpone in the interest of increasing the class, and the provision [for postponement] is inoperative." This language on its face seems an indefensible violation of the rule of § 629 that "every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be remorselessly applied." Whatever the character of the rules in regard to the determination of classes may be, they are certainly applied remorselessly without any reference to whether such application will cause the gift to be void for remoteness or not. There is no more reason in the case under consideration for changing the usual rule for the determination of classes, because otherwise the whole gift would be void for remoteness, than there was in *Leake v. Robinson*.¹

It seemed so improbable that Mr. Gray had really meant what he appeared to say that the writer was driven to invent some other meaning for this language. He conceived that what the learned author meant was that there were two separately expressed gifts, — one to the grandchildren of A *in esse* at the testator's death, by the words "to the grandchildren of A," and the other to the after-born grandchildren of A, by the words "to be paid at twenty-five"; — that the latter being too remote, but separable, may be rejected, leaving the gift to the grandchildren of A to stand. This view seemed to receive some confirmation from what appeared in § 442 a. This explanation the learned author has now so warmly condemned that it hardly seems open to further consideration.²

This leaves in support of Mr. Gray's conclusion only the sugges-

¹ 2 Meriv. 363.

² 19 HARV. L. REV. 604.

tion that the postponement clause is void, not because it violates the rule against perpetuities, but because it attempts the creation of an indestructible trust which may last too long a time, so that by the rejection of that clause as void we have a straight gift to the grandchildren of A.¹ Whether the learned author accepts this or not I do not venture to say.

On the whole, then, Mr. Gray's solution of the problem under discussion seems to rest only upon the reasoning adduced by one of his recent pupils, which in turn rests upon a principle never judicially applied in any case and only hinted at in cases like *Clafin v. Clafin*² where there was a gift to an individual and not to a class. Somehow one does not accord to the writer of a book so much latitude in promulgating new results without good reasons, as a court, which has to decide whether it wants to or not, is indulged in.

POSTPONED ENJOYMENT CLAUSES VOID APART FROM THE
RULE AGAINST PERPETUITIES.

Mr. Gray concedes that the postponed enjoyment of a vested and indefeasible equitable interest is valid everywhere if the gift is to a class.³ If the gift is to an individual, it is valid only in Massachusetts and perhaps Illinois, under what is now known as the rule of *Clafin v. Clafin*.⁴ In §§ 121 h and 121 i he suggests, however, that there must be some limits to the length of time the postponement will be allowed to continue, and the time in the future that it will be allowed to operate. In a note in a recent number of the *HARVARD LAW REVIEW*⁵ he admits that (in accordance with the language of several cases⁶) the period will very likely be copied from that adopted for the rule against perpetuities, — that is to say, a life or lives in being and twenty-one years. He seems to think, however, that there is still a question as to whether the period of a life or lives in being and twenty-one years will begin to run from the time the trust is created or from the time the postponement

¹ 19 HARV. L. REV. 598, 602-604.

² 149 Mass. 19.

³ *Oppenheim v. Henry*, 10 Hare 449; Gray, *Rule Perp.*, 2 ed., § 121 a.

⁴ 149 Mass. 19; *Lunt v. Lunt*, 108 Ill. 307; Gray, *Rule Perp.*, 2 ed., § 121 c.

⁵ Vol. 19, p. 604.

⁶ *Sadler v. Pratt*, 5 Sim. 632; *Jackson v. Marjoribanks*, 12 Sim. 93; *Shallcross's Estate*, 200 Pa. St. 122; *Winsor v. Mills*, 157 Mass. 362; *Kohtz v. Eldred*, 208 Ill. 60, 72. In Kentucky there is a statutory provision to the same effect: Ky. Stat. 1903, § 2360; *Johnson's Trustee v. Johnson*, 79 S. W. Rep. 293 (Ky., 1904).

begins to operate. He even ventures an ambulatory guess (that is, I suppose, one subject to be revoked) that it will be the latter. Thus, suppose a legacy be devised to the first-born son of A, a bachelor, contingent upon his reaching the age of twenty-one, but with a proviso that the legacy is not to be paid to him until twenty-one years after he reaches the age of twenty-one. Here, if the time at which the postponement will be effective be measured from the testator's death, it is void *in toto*, but if it be calculated from the time the postponement commences to operate, it is valid.¹

If Mr. Gray were deciding the question instead of guessing about it, there ought to be but little doubt as to what result he would choose. One who has expressed such abhorrence of the whole doctrine of *Claffin v. Claffin* as he has, would certainly be expected to choose the shorter period for the existence of the postponement. It is difficult to see upon what ground any other result could be reached.

Such authority as exists is in favor of the shorter period. Thus, the English cases which have had to deal with the time within which clauses against anticipation of a married woman's property must be operative to be valid, have settled it that the clause against anticipation is wholly void if it may possibly be in operation at a period beyond a life or lives in being and twenty-one years from the time of the testator's death or the date of the settlement. In the case of *In re Ridley*² the limitations were in substance to A for life and then to A's children living at her death, and the issue of any child then dead in equal shares *per stirpes*. Then there was the general clause that any legatees being females were to take their shares subject to a clause against anticipation. It is clear that the gift after the life estate vested in time, — namely, at A's death. If, then, the validity of the clause against anticipation be determined by reckoning the life or lives

¹ It should be observed that the case put by Mr. Gray in his note in 19 HARV. L. REV. 604 to raise this question, does not do it. He supposes in a *Claffin* state that a legacy is given "to the first-born son of A to be paid him when he reaches twenty-five," A being at present a bachelor. Under both views the postponement in such a case would last too long and therefore be void. If you measure the postponement from the time of the death of the testator, it will clearly last too long, but it will equally do so if you measure the length of time the postponement is to last from the beginning of the unborn child's interest — that is, from the moment of his birth, — because the time of payment comes, as Mr. Gray himself asserts (*Rule Perp*, 2 ed., § 121 b), not when the child reaches twenty-five or dies, whichever happens first, but when he would have reached, had he lived, the age of twenty-five.

² 11 Ch. D. 645.

in being and twenty-one years from the time the future interest vested, it must have been valid, because it would be operative only during lives in being from the time of vesting of the interests after the life estate. It was held void, however, because it might be effective at a time beyond a life or lives in being and twenty-one years from the testator's death.

It is submitted that sound public policy requires such a result. So long as the rule against perpetuities compels future interests to take effect in possession or to vest (in the feudal sense of that term) not later than twenty-one years after some life in being at the creation of the interest, it would seem inconvenient to allow trusts of interests which vest in time to be continued far beyond that period. The public policy of which the rule against perpetuities is in part an expression, is that the testator or settlor's control over his property shall cease at least at the end of a period of a life in being and twenty-one years from the death of the testator or the date of the settlement. To allow him to create an indestructible trust to last during a life or lives in being and twenty-one years after a life or lives in being and twenty-one years, will not, it is submitted, be tolerated.

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CHANGE OF POSITION AS A DEFENSE IN QUASI-CONTRACTS—THE RELATION OF IMPLIED WARRANTY AND AGENCY TO QUASI-CONTRACTS.

THAT the subject of change of position as a defense to the action for money had and received is confused, seems at first sight strange. The obligation to repay money paid to one by mistake of a material fact is quasi-contractual, since it exists regardless of consent and yet may be enforced in a contract action, and since it is imposed by law because *ex aequo et bono* the defendant ought to pay the money. Though the money is recoverable in an action at law, because common law judges saw fit to allow a remedy at law instead of requiring the plaintiff to bring a suit in equity, the right is essentially equitable.¹ On principle, therefore, whenever the defendant can show that in equity and good conscience he ought not to be required to repay, the obligation to repay should be held no longer to exist, even if it did exist prior to the time when the defendant's equitable defense arose.² This conclusion is inevitable because the obligation is in no sense contractual,—it is called *quasi-contractual* to avoid any danger of confusing it with genuine contractual obligations,—but, being implied by law in the interests of justice, it must be terminated by law when the interests of justice so require. Were it not, therefore, for certain applications of the doctrine of implied warranty in the law of sales and in the law of transfers of negotiable paper, and for the existence of a kindred doctrine in the law of agency, so great a change of position on the part of an innocent recipient of money paid by mistake of fact as to make his refusal to repay it as equitable as is the other party's demand for repayment, would probably everywhere be conceded to be a complete defense to the

¹ "In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." Lord Mansfield, in *Moses v. Macferlan*, 2 Burr. 1005, 1012.

² "The action for money had and received . . . takes the place of a bill in equity and should be encouraged within proper limits. It should not be extended, however, to cases in which the defendant may be deprived of any right or subjected to any inconvenience thereby." Allen, J., in *Rathbone v. Stocking*, 2 Barb. (N. Y.) 135, 145. See Buller, J., in *Straton v. Rastall*, 2 T. R. 366, 370.

other party's demand for restitution. It is accordingly essential to get at the reason why doctrines of warranty and of agency interfere with the application of general equitable principles, if we are to bring order out of apparent chaos. On that account the following explanation, new in statement though it may be, is offered in the hope that it will make clear why there is conflict on the subject of change of position.

I.

THE RELATION OF IMPLIED WARRANTIES TO QUASI-CONTRACTS.

Is an implied warranty a contract implied in fact or an obligation implied in law? This question is important, because if an implied warranty is a contract implied in fact it rests in theory on the ascertained intention of the parties,¹ whereas if it is an obligation implied in law it rests on the supposed requirements of "eternal justice"; and because a thing implied on account of the presumed intention of the parties must be held to override, as effectually as an express contract would, any obligation which in the absence of an actual contract the law, in the interests of justice, would imply.

The definitions of implied warranties say that they are created or arise by operation of law, and yet are genuine contracts.² But if they are contracts implied in fact, why say that they are created

¹ "It seems to me that whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted." Lord Esher, M. R., in *Ex parte Ford*, 16 Q. B. D. 305, 307.

² "A warranty is an express or implied statement of something which the party undertakes shall be part of the contract, yet collateral to the express object of it." Lord Abinger, in *Chanter v. Hopkins*, 4 M. & W. 399, 404.

"Implied warranties are created by law or spring from the facts existing at the time of sale; from what the parties did rather than from what they said. They are contracts, to be sure, but silent contracts." Bennett's note to Benjamin on Sales, 7 Am. ed., 672.

"Implied warranties are such as arise by operation of law, and an implied warranty may be defined as a contract or agreement which the law imputes to the seller by reason of the nature, circumstances, or subject-matter of the contract of sale." 2 Mechem, Sales, § 1295.

"We may say, generally, that the law implies a warranty in sales, because of attendant circumstances of the transaction and in reliance upon acts rather than words of the parties. A contract is understood, but a contract evinced sufficiently by mutual conduct, with proof of a promise." Schouler, Pers. Prop., 3 ed., § 342.

by law? That is because, in the absence of circumstances negating the existence of an implied warranty, the court will not let a jury find that there is none. All the jury has to do is to find that a certain situation exists and the court supplies the implication of warranty.¹ An implied warranty, where the proper situation for it exists, is a contract conclusively implied as a fact by the court.²

The line between an implied warranty and a quasi-contract is hard to draw, because an implied warranty, like a quasi-contract, is in theory affirmed only because substantial justice seems to demand it;³ yet it is never to be forgotten that, unlike a quasi-contract, an implied warranty is founded on the presumed intent of the parties,⁴

¹ "Implied warranties are not conclusions or inferences of fact drawn by a jury; but they are the conclusions or inferences of law pronounced by the court upon facts admitted or proved before the jury." *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 519.

"It must now be taken to be the law . . . that where property is sold by sample there is an implied warranty that the article corresponds with the sample. . . . In the absence of proof to rebut the presumption it is of equal efficacy to charge the vendor as if the seller had expressly said, 'I warrant them to correspond with the description or representation.'" *Borrekins v. Bevan*, 3 Rawle (Pa.) 23, 36.

² "I think the facts were so clear and undisputed that the court could, without error, have decided as a question of law that there was a warranty." *Earl, C.*, in *Hawkins v. Pemberton*, 51 N. Y. 198, 207.

Because an implied warranty is a contract implied in fact, it may be proven under a general averment in a complaint that the defendant warranted an article. *Rogers v. Beckrich*, 46 N. Y. App. Div. 429; *Long v. Armsby Co.*, 43 Mo. App. 253. See *Misner v. Granger*, 9 Ill. 69; *Hoe v. Sanborn*, 21 N. Y. 552; *Cleveland Linseed Oil Co. v. Buchanan*, 120 Fed. Rep. 906.

³ "A warranty should only be implied when good faith requires it." *Parker, J.*, in *McCoy v. Artcher*, 3 Barb. (N. Y.) 323, 330.

The rule of *caveat emptor* has so been modified by express and implied warranties that Mr. Schouler says: "We may well conclude that this rule of *caveat emptor* doubles upon itself; indeed, between court and jury it has come to be applied flexibly so as usually to satisfy the demands of substantial justice in each individual case." *Schouler, Pers. Prop.*, 3 ed., § 343.

⁴ "Now an implied warranty, or, as it is called, a covenant in law as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have." *Bowen, L. J.*, in *The Moorcock*, L. R. 14 P. D. 64, 68.

"Here, if we were to imply such a contract as is suggested, we should, as it seems to me, be incurring great danger of implying something that neither party ever intended." *Kay, L. J.*, in *Hamlyn v. Wood*, [1891] 2 Q. B. 488, 495.

and hence, though implied in general in the interests of substantial justice, answers to other tests than those of unconditioned equity.¹ The real or imaginary business needs of a situation may lead to the implication of a warranty presumably intended by the parties where the law of quasi-contracts demands a different solution of the difficulty.

An example of the struggle between implied warranty and quasi-contract, full of significance for the question of change of position, is found in the controversy over *Price v. Neal*² and kindred cases. That the drawee of a bill of exchange or check cannot recover money paid by him under mistake as to the genuineness of the drawer's signature,³ or as to the state of his account,⁴ yet is allowed to recover where the mistake is as to the alteration of the body of the bill or check,⁵ is inexplicable to one who does not see in the result a compromise between the law of quasi-contracts and the law of implied warranty.⁶ On the one hand you have the broad equitable doctrine, "that as between two persons having equal equities, one of whom must suffer, the legal title shall prevail,"⁷

¹ A warranty will not be implied where there is an express warranty. See 2 Mechem, Sales, § 1259, and cases cited. A few late cases are *Reynolds v. General Electric Co.*, 141 Fed. Rep. 551; *La Crosse Plow Co. v. Helgeson*, 106 N. W. Rep. 1094 (Wis.); *Gaar Scott & Co. v. Hodges*, 90 S. W. Rep. 580 (Ky.). And it will not be implied where there is a refusal to give an express warranty. *Hartin Com. Co. v. Pelt*, 88 S. W. Rep. 929 (Ark.).

² 3 Burr. 1354. See the admirable article by Professor Ames on "The Doctrine of *Price v. Neal*" in 4 HARV. L. REV. 297.

³ 4 HARV. L. REV. 297, and cases cited. See *First Nat'l Bank of Belmont v. First Nat'l Bank*, 58 Oh. St. 207. But see the curious reactionary decision of *First Nat'l Bank v. Bank of Wyndmere*, 108 N. W. Rep. 546 (N. D.), noted in 20 HARV. L. REV. 145.

⁴ 4 HARV. L. REV. 305, and cases cited; *Riverside Bank v. First Nat'l Bank*, 74 Fed. Rep. 276. On this point there are a few contrary decisions. See *ibid.*

⁵ 4 HARV. L. REV. 306, and cases cited.

⁶ Professor Keener in his excellent treatise on Quasi-Contracts said of these decisions (p. 158, n.): "It is submitted that on no theory of quasi-contracts can the decisions reached in the cases . . . be reconciled or the results reached in many of the cases be justified."

⁷ Professor Ames in "The Doctrine of *Price v. Neal*," 4 HARV. L. REV. 297-299. See *Holley v. Domestic and Foreign Miss. Soc.*, 180 U. S. 284. Curiously enough, Professor Keener could not see that in *Price v. Neal* the equities are equal. Keener, Quasi-Contracts, 155, 156. He could see clearly enough that a defendant's innocent change of position subsequent to the plaintiff's mistaken payment should be a complete defense, although that change of position, to use his phrases about *Price v. Neal*, is a transaction complete in itself and follows in point of time the entirely independent transaction between the plaintiff and the defendant (Keener, Quasi-Contracts, 59-74); but he did not appreciate that *Price v. Neal* is really a case of change of position, although the defendant's change of position took place *before*

which is given due application where a drawer's signature is forged and, by the better opinion, where he had no funds in bank; but on the other hand you have first the broad legal doctrine that by contract express or implied in fact the parties may disregard this equitable doctrine,¹ and then the business instincts of the judges insisting that the parties have disregarded it by a contract implied in fact where payment is made on a raised check.² In any event

instead of *after* the plaintiff's mistaken payment. It is true that, where the change of position takes place after the plaintiff's payment, one is apt to feel that the plaintiff induced the change, — a feeling which necessarily is absent where the change of position takes place before plaintiff pays; yet if that feeling of causation is to affect one's appraisal of the equities — and where plaintiff is innocent and careful in making the payment it seems wholly wrong to let it do so — it can only make one say that the defendant's equity is superior to the plaintiff's in such a case. It certainly ought not to make one say that in *Price v. Neal* the equities are not equal; for it is the innocent change of position, as such, of the defendant in whatever order of time it occurs, that gives him an equity equal to that of the innocent change of position, as such, of the plaintiff, found in the latter's mistaken payment. As a matter of fact the courts in the change of position cases do not seem to be influenced by the causation idea where negligence is not a factor, and accordingly we find some courts which follow *Price v. Neal* allowing a recovery against a defendant whose position has changed since the payment. So the fact that a defendant's knowledge of the forgery, acquired after he gets the forged paper and before the plaintiff pays, will keep his equity from equalling the plaintiff's equity, is troublesome to Professor Keener (*Quasi-Contracts*, 156) just because he does not see that the defendant is as much to blame in such a case for the plaintiff's payment as a plaintiff is to blame for a defendant's change of position where the plaintiff pays innocently, but after discovering the mistake is negligent about notifying the defendant, who after such negligence innocently changes his position. Professor Keener's insistence that the loss should be thrown on the plaintiff in the last-mentioned situation (*Quasi-Contracts*, 72, 73), logically requires him to throw it on the defendant in the first-mentioned case. The situation which the parties occupied at the time the plaintiff made his payment would seem to be entitled to no peculiar importance when the *relative* equities of the parties are involved, as the cases on change of position show.

¹ For instance, all must agree that a holder of a check who should expressly guarantee to the drawee the genuineness of the drawer's signature could not rely on the equitable doctrine as a defense. Cf. *Second Nat'l Bank v. Guarantee, etc., Co.*, 206 Pa. St. 616.

² Even with reference to payment on a forged drawer's signature, we have some writers calling for the implication of a warranty. We have Mr. Daniels in his work on *Negotiable Instruments* insisting that a warranty should be implied in such a case, and we have Professor Ames insisting that it should not. The victory is with Professor Ames, because both equitable principle and the presumed intention of the parties agree that the drawee should stand the loss. The common understanding of the business world today undoubtedly is that the drawee must know at his peril the drawer's signature, and that the holder impliedly warrants nothing as to that; and consequently equitable principle has in such a case no contract implied in fact to modify or nullify it. Cf. the remarks of Holmes, C. J., in *Dedham Nat'l Bank v. Everett Nat'l Bank*, 177 Mass. 392, 395.

the fact that an implied warranty is a contract implied in fact, and as such must prevail, as effectually as an express contract would, over any general obligation which in the absence of an actual contract the law would raise, would seem to be the key to the mystery of the conflict in the above cases of payments on forged paper;¹ and even if one concludes that the feeling of the judges as to what must have been the underlying understanding of business people has been allowed to overcome equitable principle where it should not have done so, it is consoling to know that the error, if it be one, is due rather to poor business judgment than to defective legal conscience.²

¹ The cases of payment under a mistake as to a forged indorsement have been fully discriminated from *Price v. Neal*, on the ground that the defendant takes the legal title as trustee for the real owner of the paper, and that the payor, who on principle should sue the defendant only after he has paid the real owner and been subrogated to his rights, has for practical reasons been allowed a direct action against the defendant before he has paid the real owner. See Professor Ames, 4 HARV. L. REV. 297, 307. This result is, of course, supported also by the considerations already discussed where a check has been raised in amount. Where the holder expressly guarantees the genuineness of all indorsements in his chain of title, the payor's right to recover is unquestioned. *Second Nat'l Bank v. Guarantee, etc., Co.*, 206 Pa. St. 616. And if it is proper to say that the parties presumably intend such a guaranty where nothing is said, a contract implied in fact that the endorsement is genuine makes a defendant liable. For the reasons suggested by Professor Ames, however, it would seem to be unnecessary to imply such a contract, though the possibility of the implication serves to explain why the payor can recover without first paying the real owner of the paper. On the effect of change of position where there has been payment on a forged indorsement, see *London and Riverplate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7.

² The statement of Holmes, C. J., in *Dedham Nat'l Bank v. Everett Nat'l Bank*, 177 Mass. 392, 395, about the rule in *Price v. Neal* that, "Probably the rule was adopted from an impression of convenience rather than from any more academic reason," would seem to be the opposite of the fact. It apparently was adopted because of general equitable principle (see Professor Ames in 4 HARV. L. REV. 299, 300), and was retained because it did not conflict with the presumed intention of the parties. That it did not so conflict Mr. Justice Holmes makes plain in the rest of his opinion.

Cases such as *Leather v. Simpson*, L. R. 11 Eq. 398, and *Goetz v. Bank*, 119 U. S. 551, where a drawee who pays genuine bills of exchange accompanied by forged bills of lading is not allowed to recover because the equities of the parties are equal, present sharply the question of whether a warranty should not be implied. Why imply a warranty where the body of a bill of exchange has been altered, and not imply one where a forged bill of lading accompanies a genuine bill of exchange? The feeling that the unexpressed but actual understanding of the parties requires the implication of a warranty in the bill of lading cases would seem to be the only excuse for the decision in *Guarantee Trust Co. v. Grottrian*, 114 Fed. Rep. 433, where a United States Circuit Court of Appeals held that the fact that the bill of exchange, which was accompanied by forged bills of lading for flax seed, was accepted "against indorsed bills of lading for 8417 bushels of flax seed," would allow the plaintiffs to recover the subsequent payment because "under their conditional acceptance the plaintiffs had a right

II.

THE RELATION OF AGENCY TO QUASI-CONTRACTS.

The relation of implied warranty to quasi-contracts having been explained, very little need be said about the relation of agency to quasi-contracts. Agency and quasi-contracts touch on the subject of change of position. It is held that an agent who acts for a disclosed principal and, without knowing that a payment has been made to him by mistake of fact, turns the money over to his principal, is freed from liability to the payor;¹ but that an agent who purports to act for himself and not for a principal has no defense in the fact of payment to his principal, even if the latter has since become insolvent.²

The reason why the agent for the undisclosed principal remains liable, despite a settlement with the principal, is that the agent impliedly warrants that he has acted for no one but himself, and must abide by the consequence of that warranty. The cases do not call it implied warranty, but that is clearly what it amounts to. The defendant is held impliedly to have represented that he was a principal and to have promised in fact, though not expressly, to remain such, and hence is not allowed to show any change of position which has taken place solely because the implied promise is false. Here, again, if the courts are in error, their fault is one of business judgment and not of conscience; it is the presumed intention of the parties — their understanding implied in fact³ — that the courts allow to override the general notions of equity.

to genuine documents and to rely upon the genuineness of those delivered upon the discharge of their obligation."

¹ *Holland v. Russell*, 4 B. & S. 14; *Ellis v. Goulton*, [1893] 1 Q. B. 350; *McDonald v. Napier*, 14 Ga. 89; *Mowatt v. McClelan*, 1 Wend. (N. Y.) 173; *Nat'l Park Bank v. Seaboard Bank*, 114 N. Y. 28. See *Smith v. Binder*, 75 Ill. 492; *Shand v. Grant*, 11 C. B. (N. S.) 324. And see *Continental, etc., Co. v. Kleinwort*, 90 L. T. R. 474. See also cases of payment over by an administrator, *Grier v. Huston*, 8 Serg. & R. (Pa.) 401; *Beam v. Copeland*, 54 Ark. 70; and by a public officer, *Dickey Co. v. Hicks*, 103 N. W. Rep. 423 (N. D.).

² *Newall v. Tomlinson*, L. R. 6 C. P. 405; *First Nat'l Bank of Minneapolis v. Holyoke Nat'l Bank*, 182 Mass. 130; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Holt v. Ross*, 54 N. Y. 472; *Merchants Bank v. McIntyre*, 2 Sandf. (N. Y.) 431; *Smith v. Kelly*, 43 Mich. 390. See *United States v. Pinover*, 3 Fed. Rep. 305, 309, and *Continental, etc., Co. v. Kleinwort*, 90 L. T. R. 474.

³ "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract." Lord Denman, C. J., in *Humble v. Hunter*, 12 Q. B. 310, 317.

Now we are ready for our discussion of the cases on change of position. The first thing to do is to define our terms.

III.

CHANGE OF POSITION AS A DEFENSE.

The words "change of position" are used here simply in the ordinary sense of such a change in the situation of the defendant, in consequence of the mistake in payment,¹ as will entail financial loss to him if he has to make repayment. That change may consist in the loss of a legal right on the very claim or instrument upon which the payment is made,² or in the giving up of property,³ or in delay in getting at the person really liable,⁴ or in the payment of money⁵ to third persons.⁶ Such a change of position may mean a total or only a partial loss, and, if the latter, can be of course only *pro tanto* a defense.⁷

¹ Where it is not in consequence of the payment, change of position is immaterial. See *Continental, etc., Co. v. Kleinwort*, 51 Wkly. Rep. 541, and on appeal in 90 L. T. R. 474; *Nat'l Bank of Commerce v. Nat'l Banking Ass'n*, 55 N. Y. 211. It is only by showing that but for the mistake he would not have changed his position, that the defendant can get any equity. Causation is necessary to make his change of position part of the same transaction as the plaintiff's mistaken payment, but that causation need not impute any blame to the plaintiff.

² See *Pooley v. Brown*, 11 C. B. (N. S.) 566; *Watson v. Moore*, 33 L. T. R. 121; *Behring v. Somerville*, 63 N. J. L. 568.

³ See *Walker v. Conant*, 69 Mich. 321.

⁴ *Continental Nat'l Bank v. Nat'l Bank of Commonwealth*, 50 N. Y. 575; *Boas v. Updegrave*, 5 Pa. St. 516. The dictum *contra* in *Standish v. Ross*, 3 Ex. D. 527, cannot be supported. It is only a dictum, because prior to the sheriff's levy the defendant's attorney knew of the defect in the defendant's title, and the defendant therefore had no defense against the sheriff who had acted innocently; for the defendant alone was to blame and should bear the loss. See cases under III (b), *infra*.

⁵ See *Crocker Woolworth Bank v. Nevada Bank*, 139 Cal. 564; *Union Bank v. Ontario Bank*, 24 Lower Can. Jur. 309.

⁶ Since there seem to be no cases where change of position has been claimed because the defendant afterward lost the identical money paid him, or had it stolen from him, before confusing it with his own, that case is not considered, though it is submitted that on principle such a change of position should be a complete defense.

Whether, as was intimated in *Sir Charles Brisbane v. Dacres*, 5 Taunt. 144, and in *Skyring v. Greenwood*, 4 B. & C. 281, a change of position is made out by showing that because of the mistaken payment the defendant has altered his mode of living, is open to doubt, since it must be assumed that the defendant has had his money's worth of enjoyment. Yet to allow a recovery where the defendant has proved beyond a reasonable doubt that the mistake caused the change in the defendant's habits of life may in some cases work great hardship on the defendant. It is probably no defense, but the matter is not concluded by authority.

⁷ See *Bean v. Copeland*, 54 Ark. 70.

And now we are prepared for the cases. In considering them it is desirable to follow Professor Keener's classification.¹

(a) The plaintiff alone is negligent or is more at fault than the defendant.

If the defendant has not altered his position in consequence of the mistake, it is no defense to him that the plaintiff was more negligent than the defendant or that the plaintiff alone was negligent;² but where the defendant has changed his position in consequence it is a defense.³ It being the plaintiff's own fault that one of them must suffer a loss, he and not the defendant should suffer it.

¹ "Is it against conscience for a defendant to retain money paid to him under mistake, when the circumstances are such that the parties can no longer be put in *statu quo* and the repayment thereof will throw a loss upon him? This question may arise where, but for the negligence of the plaintiff, the mistake would not have been made; where the mistake was due to the negligence of the defendant; where neither the plaintiff nor the defendant can be said to have been negligent; where, if the plaintiff was negligent the defendant was equally negligent; or where, though there was no negligence at the time of payment, the plaintiff had been guilty of laches in asserting his rights." Keener, *Quasi-Contracts*, 59.

² *Kelley v. Solari*, 9 M. & W. 54; *Townsend v. Crowdy*, 8 C. B. (N. S.) 477; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49; *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518; *Merchants Bank v. Eagle Bank*, 101 Mass. 281; *Union Nat'l Bank v. Sixth Nat'l Bank*, 43 N. Y. 452; *Lawrence v. American Nat'l Bank*, 54 N. Y. 432; *McKibben v. Doyle*, 173 Pa. St. 579; *Rutherford v. McIvor*, 21 Ala. 750; *Young v. Lehman*, 63 Ala. 519; *First Nat'l Bank v. Behan*, 91 Ky. 560; *Fraker v. Little*, 24 Kan. 598; *Douglas County v. Keller*, 43 Neb. 635; *Alston v. Richardson*, 51 Tex. 1; *Devine v. Edwards*, 101 Ill. 138; *Brown v. College Corner Co.*, 56 Ind. 110; *City Nat'l Bank v. Peed*, 32 S. E. Rep. 34 (Va.); *U. S. v. Park Bank*, 6 Fed. Rep. 852. There are cases *contra*. See Keener, *Quasi-Contracts*, 70, n. 2.

³ *Deutsche Bank v. Beriro*, 73 L. T. R. 669; *Continental Nat'l Bank v. Tradesmen's Bank*, 173 N. Y. 272; *Walker v. Conant*, 65 Mich. 194; *Wilson v. Barker*, 50 Me. 447; *Fegan v. Great Northern Ry. Co.*, 9 N. D. 30; *Richey v. Clark*, 11 Utah 467; *Maher v. Miller*, 61 Ga. 556; *German Security Bank v. Columbia, etc., Co.*, 27 Ky. L. Rep. 581; *Pelletier v. State Nat'l Bank*, 41 So. Rep. 640 (La.). See also *Mayer v. Mayor of New York*, 63 N. Y. 455; *DeNayer v. State Nat'l Bank*, 8 Neb. 104, 108.

While no implied warranty as to the genuineness of the body of a check arises from certification, and it is not necessarily negligent to certify checks previously altered and then pay them (*Metropolitan Nat'l Bank v. Merchants Nat'l Bank*, 182 Ill. 367; 5 Cyc. 542), or to pay a certified check altered after certification (*Nat'l Bank of Commerce v. Nat'l, etc., Ass'n*, 55 N. Y. 211; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49; *Clews v. Bank of New York, etc., Ass'n*, 89 N. Y. 418; but see same case 114 N. Y. 70), it is negligence estopping the plaintiff from suing for it to adopt a forged certification and to pay a defendant who thereupon innocently changes his position. *Continental Nat'l Bank v. Nat'l Bank*, 50 N. Y. 575. See 5 Cyc. 543. Moreover, if there is actual negligence, the certifying bank cannot recover the money paid on the raised check to one who has since changed his position. *Continental Nat'l Bank v. Tradesmen's Bank*, *supra*.

(b) The defendant alone is negligent or is more at fault than the plaintiff.

For the same reason, in either of these situations, the defendant must bear the loss;¹ and this is true where the negligence of his agent is imputed to him.²

(c) Neither party is negligent.

It is here that we experience difficulty with the cases. The title to the money paid having vested in the defendant,³ and the plaintiff having no right to recover it unless it is unconscientious for the defendant to refuse restitution, equitable principle would seem clearly to require that a defendant who has altered his position because of a mistaken payment for which he is not to blame should be excused *pro tanto* from repayment. "The principle which forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself at the expense of an innocent and blameless defendant."⁴ But this equitable principle has been disregarded in some of the cases. So far as it has been departed from because of contracts express or implied in fact which are inconsistent with its application, and most of the cases come under this head, the writer has nothing to say here. The cases where the defendant is estopped to set up a change of position because of his indorsement,⁵ or because of his implied warranty, or because he failed to disclose that he was acting for a principal with whom he has since settled, represent a conflict between equitable principle and real or supposed business under-

¹ *Union Bank v. U. S. Bank*, 3 Mass. 74; *Phetteplace v. Bucklin*, 18 R. I. 297. See *White v. Continental Bank*, 64 N. Y. 617; *Rose v. Shore*, 1 Call (Va.) 540. And see the cases where the plaintiff is in the same situation as that of *Price v. Neal*, except that the defendant's negligence is the approximate cause of the loss, and the plaintiff is allowed to recover. *Canadian Bank of Commerce v. Bingham*, 31 Wash. 484; *People's Bank v. Franklin Bank*, 88 Tenn. 299; *Nat'l Bank of N. A. v. Bangs*, 106 Mass. 441; *First Nat'l Bank of Danvers v. First Nat'l Bank of Salem*, 151 Mass. 280; *Ellis v. Ohio Life, etc., Co.*, 4 Oh. St. 628 (and see *First Nat'l Bank v. First Nat'l Bank*, 58 Oh. St. 207); *First Nat'l Bank of Orleans v. State Bank of Alma*, 22 Neb. 769; *First Nat'l Bank of Quincy v. Ricker*, 71 Ill. 439; *Rouvant v. San Antonio Nat'l Bank*, 63 Tex. 610; *First Nat'l Bank v. First Nat'l Bank*, 4 Ind. App. 355. But see *Commercial, etc., Bank v. First Nat'l Bank*, 30 Md. 11, where the defendant's change of position was apparently allowed to condone his negligence.

² *Standish v. Ross*, 3 Ex. D. 527, where the knowledge of the defendant's attorney was imputed to him, while the plaintiff had acted innocently.

³ Keener, *Quasi-Contracts*, 63-65.

⁴ Keener, *Quasi-Contracts*, 67. See also the sound dictum in *Guile v. Balbridge*, 2 Swan (Tenn.) 295.

⁵ That which is an indorsement in form may in fact be only a receipt for payment. *First Nat'l Bank v. Holyoke Nat'l Bank*, 182 Mass. 130. See 4 HARV. L. REV. 302.

standing, and if the business understanding actually is satisfied by them, or reasonably so, it is probably more important to have the rule certain than to have it settled in any given way.¹

But there is no excuse for the departure from equitable principle where the actual understanding of the parties cannot be called in to justify it. The cases, therefore, where no express contract exists and no question of implied warranty or misrepresentation as to agency is involved, and yet the plaintiff is allowed to recover against an equally innocent defendant who has suffered an irrevocable change of position, must be condemned unqualifiedly. Fortunately the latter cases are few,² and once they are discriminated from the cases where contracts express or implied in fact are asserted, it ought not to be hard to get them overruled, especially as they are squarely opposed by cases in other jurisdictions.³ Certainly the chances of a reversal, and of keeping new jurisdictions from following these erroneous cases, are greatly increased by showing that these cases form a class by themselves because there is in them no undertaking implied in fact to interfere with equitable principles.⁴

¹ "But even if the decisions had originated the difference without adequate ground, when once it exists its existence is a sufficient reason for continuing to decide in accordance with it." Holmes, C. J., in *Dedham Nat'l Bank v. Everett Nat'l Bank*, 177 Mass. 392, 396.

² They are *Durrant v. Ecclesiastical Commissioners*, 6 Q. B. D. 234; *Kingston Bank v. Eltinge*, 40 N. Y. 391; *Bank of Toronto v. Hamilton*, 28 Ont. 51; and see *Phetteplace v. Bucklin*, 18 R. I. 297; *Koontz v. Central Nat'l Bank*, 51 Mo. 275.

³ *Crocker Woolworth Bank v. Nevada Bank*, 139 Cal. 564; *Behring v. Somerville*, 63 N. J. L. 568; *Boas v. Updegrove*, 5 Pa. St. 516; *Union Bank of Lower Canada v. Ontario Bank*, 24 Lower Can. Jur. 309. See *Pensacola, etc., Co. v. Braxton*, 34 Fla. 471.

⁴ In England *Durrant v. Commissioners*, *supra*, which "is difficult to explain, unless by reason of the relative positions in life of the parties the defendant should be held responsible for the consequences of the mistake" (Professor Ames, 4 HARV. L. REV. 310, n.), might easily be overruled, for the court was mistaken in supposing it to be sustained by *Cocks v. Masterman*, 9 B. & C. 902 (see Keener, *Quasi-Contracts*, 66, 67), and seemingly overlooked the earlier case of *Watson v. Moore*, 33 L. T. R. 121. See also *Pooley v. Brown*, 11 C. B. (N. S.) 566.

In New York, *Kingston Bank v. Eltinge*, 40 N. Y. 391, has been approved in dicta and has been supposed to be supported by *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74, but the latter case was a case of forged indorsement and hence governed by different considerations. The later New York cases are not unfriendly to a change from *Kingston Bank v. Eltinge*. See *Continental Nat'l Bank v. Tradesmen's Bank*, 173 N. Y. 272, where the court recognized the equity of the defendant's change of position, and said that the plaintiff could not recover even if it did not owe any duty to the defendant in particular, but simply owed a general duty. See also *Nat'l Park Bank v. Seaboard Bank*, 114 N. Y. 28. The fact that in *Kingston Bank v. Eltinge*,

The doctrine of *Durrant v. Commissioners*¹ and its small following, that the irrevocable change of position of the defendant is immaterial where there is no "mutual relation between the parties creating a duty on the part of the plaintiff" to the defendant, misconceives the situation altogether. The defendant has the legal title to the money and can be deprived of it only where it is inequitable for him to keep it; but where the defendant's situation has changed in consequence of the mistake, so that repayment would leave him with a total loss, it is clearly not inequitable for him to keep it. The question is not whether the plaintiff owes a duty to the defendant, but whether the defendant has been excused from the obligation to repay.

This point is brought out clearly in the late case of *Crocker Woolworth Bank v. Nevada Bank*.² It is almost never that a check case can present the equitable situation freed from questions of implied warranty and of agency, but this case seems to do it. For reasons not material and not defended here, the California court held that the plaintiff had paid the defendant a raised check on a so-called indorsement so restricted that the defendant was not liable on the indorsement; that the defendant incurred no implied liability from presenting the check for payment so indorsed; and that the defendant did not impliedly or otherwise represent to the plaintiff that the defendant was acting as a principal. That left the situation simply one of payment by an innocent mistake of the plaintiff, receipt by an innocent mistake of the defendant, and an innocent change of position by the defendant in the subsequent payment of most of the money over to its depositor. The California court thereupon properly held that the equities were equal, and that the plaintiff could not recover the money the defendant had paid over to its depositor.³

40 N. Y. 391, the court wrongly considered "that the plaintiff had the legal title although the money had been paid to the defendant by the plaintiff's consent" (4 HARV. L. REV. 310, n.), coupled with the fact that the decision did not even determine finally the rights of the parties to the action, — the defendant ultimately obtained a judgment on other grounds (*Kingston Bank v. Eltinge*, 66 N. Y. 625), — ought to make a reversal feasible.

Ontario would doubtless sooner or later follow England, if the latter should change, especially as one Canadian case announces the right rule. *Union Bank v. Ont. Bank*, 24 Lower Can. Jur. 309.

¹ 6 Q. B. D. 234.

² 139 Cal. 564.

³ As a decision on the subject of change of position, the California case is not seriously impaired by the general doctrine that where it appears from the indorsement that the collecting bank is acting merely as agent, it cannot be made to refund if it has

(d) The parties are equally negligent.

It seems clear that in a jurisdiction where no recovery is allowed if both parties are free from blame as to the mistake, no recovery will be allowed where they are equally to blame. The defendant has the legal title to the money and the equity of a change of position, while the plaintiff has no superior equity. Indeed, the plaintiff should no more recover here than where he alone is to blame, for "the fact being that but for the negligence of the plaintiff no loss would have been incurred, the law should leave the loss where it finds it."¹ In a jurisdiction where recovery is allowed despite the fact that the defendant is not to blame and has innocently changed his position, recovery will be allowed where the parties are equally to blame.² If the defendant has not changed his position, the plaintiff will, of course, recover.³

(e) The plaintiff has been guilty of negligence about notifying the defendant of the mistake.

Since there can be no recovery where the plaintiff alone was negligent and the defendant suffered a loss, it is just as true that there can be no recovery where money is paid by mistake and the plaintiff, even though careful at the time, is negligent about notifying

paid over the money to its principal before notice of the mistake. *Nat'l Park Bank v. Seaboard Bank*, 114 N. Y. 28. The reason why it is not so impaired is that the court does not hold that the indorsement — "pay only through the clearing-house" — gave notice of agency, but simply said that in view of that indorsement the plaintiff could not say that the defendant represented anything more than the fact that the defendant was the holder of the check (139 Cal., at p. 582). To be sure, on the same page the court refers to the "general practice" proven for banks not to buy, but to take for collection only, local checks such as the one paid by plaintiff, but even that general practice is not relied on to show that plaintiff knew that defendant was an agent; — it is simply referred to in order to negative the claim of the plaintiff that plaintiff had the right to infer that the defendant received payment as owner of the check or acted upon any such inference. No doubt if it had been necessary, the court would have held that the plaintiff knew that defendant was an agent, as it shows on pp. 582–583 that there was evidence that the plaintiff did know that fact, but the court preferred to rest its decision on the broad equitable principle announced in *Holley v. Missionary Society*, 180 U. S. 284. See 139 Cal., at pp. 570–573.

¹ Keener, *Quasi-Contracts*, 72. See *Pooley v. Brown*, 11 C. B. (N. S.) 566, where the mistake was treated by the majority of the court as one of law, and both parties being at fault, the plaintiff was not allowed to recover against a defendant whose position was changed. The case of *Behring v. Somerville*, 63 N. J. L. 568, seems to be a case where neither party was actually negligent, but might be cited here.

² *Koontz v. Central Nat'l Bank*, 51 Mo. 275. In *Union Bank v. Bank of U. S.*, 3 Mass. 74, the court seems to have regarded the defendants as more negligent than the plaintiff, — "they committing the first fault." The same seems true of *Clark v. Eckroyd*, 12 Ont. App. 425.

³ *Devine v. Edwards*, 87 Ill. 177.

the defendant after the plaintiff discovers the mistake, and in consequence the defendant innocently changes his position.¹

CONCLUSION.

In closing it should be said that if this paper has made any clearer the problem before the court in the kind of cases here discussed, it has served its end. This particular field has been somewhat neglected, so that exposition rather than argument is needed. Our exposition has disclosed that except in a few jurisdictions change of position caused by a payment made under mistake of fact, for which mistake the defendant is not responsible, is a complete defense to an action to recover the money, unless by express contract or by a contract implied in fact the defendant has put it out of his power to make use of the defense.

It should be added that except in the few jurisdictions which allow a plaintiff to throw the loss upon an equally innocent defendant by taking from such defendant that title to the money which the plaintiff himself conferred upon the defendant, it is impossible to assert positively that the results reached by the courts are erroneous. It being conceded, as under our common law system it must be, that the general equitable doctrine that where the equities are equal the legal title must prevail has no application where by actual contract, that is, by express contract or by contract implied in fact, the parties agree that it shall not apply, the cases which find such an implied actual contract to exist rest upon an assumed general business understanding which is extremely difficult, if not impossible, to disprove. For that reason it is believed that they are now invulnerable to attack except through legislation. But vigorous protest may be effective, and therefore must still be raised, against those cases where equitable principle as such has been violated by the courts.

George P. Costigan, Jr.

LINCOLN, NEBRASKA.

¹ *Skyring v. Greenwood*, 4 B. & C. 281; *Pooley v. Brown*, 11 C. B. (N. S.) 566; *Iron City Nat'l Bank v. Ft. Pitt Nat'l Bank*, 159 Pa. St. 46; *U. S. v. Clinton Nat'l Bank*, 28 Fed. Rep. 357; *Third Bank v. Merchant's Bank*, 76 Hun (N. Y.) 475; *Continental Nat'l Bank v. Metropolitan Nat'l Bank*, 107 Ill. App. 455. And see *London and Riverplate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7; *Bank of St. Albans v. Farmers', etc., Bank*, 10 Vt. 141.

The case of *Iron City Nat'l Bank v. Ft. Pitt Nat'l Bank*, *supra*, is in point on this question of change of position solely because a statute has changed the rule of *Price v. Neal* in Pennsylvania. See *Corn Exchange Nat'l Bank v. Nat'l Bank of the Republic*, 78 Pa. St. 233.

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THE PROPOSED RIGHT OF APPEAL BY THE GOVERNMENT IN CRIMINAL CASES. — In this country, by the overwhelming weight of authorities, including the United States Supreme Court, it is held that the common law gives the state no right of appeal in criminal cases.¹ In the recent message to Congress, President Roosevelt called attention to the need of an enactment altering the present rule, and conferring upon the United States the right of appeal in criminal cases on questions of law. He points out incisely the power at present possessed by a single district judge to set at naught a congressional enactment believed by the vast majority of his colleagues to be valid; the danger of frequent conflicts, real or apparent, in the decisions of the various district or circuit courts, and the unfortunate results thereof; and the impossibility of the government's obtaining final and uniform rulings by recourse to a higher court. At the last session of Congress the House of Representatives, recognizing these evils, passed a bill allowing the United States "the same right of review by writ of error that is given to the defendant, including the right to a bill of exceptions: provided that . . . a verdict in favor of the defendant shall not be set aside."² The bill, entirely transformed, was unanimously reported by the Senate committee on judiciary.³ As amended, it granted to the United States writs of error (and bills of exceptions) from decisions or judgments, "quashing or setting aside an indictment"; "sustaining a demurrer to an indictment or any count thereof"; "arresting a judgment of conviction for insufficiency of the indictment"; or "sustaining a special plea in bar when the defendant has not been put in jeopardy." Although little was said in opposition to this measure, it never reached a vote.

From a legal standpoint the proposed legislation seems likely to involve few seriously objectionable features. The enactment, however, should not

¹ United States *v.* Sanges, 144 U. S. 310, and cases cited. See also 8 HARV. L. REV. 354.

² See Congressional Record, 1st Session 59th Congress, 5408.

³ See Congressional Record, 1st Session 59th Congress, 7589, 8695.

allow the government an appeal where it can have no effect on the fate of the defendant. It is unnecessary to consider whether or not such a provision would be unconstitutional; it is enough that bench and bar unite in condemning such proceedings, as productive of *ex parte* arguments and consequently poor decisions.⁴ For this reason the House bill before mentioned seems ill-advised in providing that the government may appeal after a verdict of acquittal, but that the verdict shall not be set aside. Moreover, the enactment must not involve "double jeopardy" within the constitutional prohibition,⁵ as construed by the United States Supreme Court. Under the rulings of this court jeopardy begins at the moment when the jury is empanelled and sworn,⁶ at least "if the preliminary things of record are ready for the trial."⁷ If there is a valid indictment and a jury sworn,⁸ and also, it is held, if there is a defective indictment with a verdict of acquittal on the merits,⁹ the accused has been in jeopardy. Conversely, no jeopardy is produced by preliminary proceedings such as a motion to quash or demurrer to the indictment;⁹ and if after conviction the prisoner moves for arrest of judgment because of insufficiency of the indictment, his former jeopardy, if any, should be considered waived.¹⁰ Under these doctrines of jeopardy, the Senate bill already cited seems particularly happy in granting the government an appeal in all those cases, and those only, where it may be allowed with legal and constitutional propriety. The seriousness of the evils existing at present, and the possibility of an entirely unobjectionable enactment of much remedial efficacy, seem to bespeak for the President the hearty support of the legal profession in his efforts to secure the timely passage of the recommended legislation.

POSTPONEMENT OF FUTURE GIFT "AS LONG AS LEGALLY POSSIBLE." — At common law no future interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the time of the creation of the interest.¹ Courts have consistently refused to restrict the choice of lives to beneficiaries under the gift, or to limit the number which may be taken to measure its postponement.² Twenty-eight lives have been held not too many,³ and the reason is given as Twisden put it: "All the candles are lighted at once."⁴ The lives taken must not, however, be so numerous or so obscure as to preclude ascertainment by reasonable evidence at what time the survivor ceases to exist.⁵ Thus a gift twenty-one years after the death

⁴ See Senator Spooner's remarks, Congressional Record, 1st Session 59th Congress, 9033. Cf. Wambaugh, Study of Cases, 2 ed., § 5.

⁵ See U. S. Const., Fifth Amend.

⁶ See *Kepner v. United States*, 195 U. S. 100, 128. See also 18 HARV. L. REV. 216.

⁷ Cf. 1 Bish., Crim. L., 7 ed., § 1020.

⁸ *United States v. Ball*, 163 U. S. 662. See also *Kepner v. United States*, *supra*, 130.

⁹ See *Kepner v. United States*, *supra*, 130.

¹⁰ *United States v. Ball*, *supra*, 672. Cf. *Joy v. The State*, 14 Ind. 139.

¹ Gray, Rule Perp., 2 ed., § 201.

² *Thellusson v. Woodford*, 4 Ves. 227.

³ *Cadell v. Palmer*, 1 Cl. & F. 372. Cf. *Humberston v. Humberston*, 1 P. Wms. 332, where Lord Cowper decreed that an executory trust of a perpetuity be settled upon some fifty life-tenants and then over in tail.

⁴ *Love v. Windham*, 1 Sid. 451.

⁵ Gray, Rule Perp., 2 ed., § 217.

of all persons in the world now alive, though within the rule against remoteness, violates this independent rule against uncertainty.⁶

An express provision in a will that the postponement be "as long as the law allows" raises a perplexing question. A testator may effectively say that his gift is to comply with the rule against perpetuities, but a declaration that it is not to violate the rule against uncertainty cannot render it certain. Definite lives are essential to the period of postponement, and if the will so designate lives therein mentioned, however slightly, they will be taken. This was the unchallenged procedure in an English case where counsel agreed that the testator designated one or the other of two sets of lives mentioned, and asked the court to decide which.⁷ The Supreme Court of Hawaii has recently declared that a trust to pay annuities to forty-two annuitants and their heirs "for as long a period as is legally possible," and then to divide the *corpus* equally among the then annuitants, clearly discloses an intent that the lives of the annuitants measure the period of postponement. *Fitchie v. Brown*, November 1, 1906. The court thereby first imputes to the testator knowledge that the rule against perpetuities depends upon lives, and then finds that he meant these lives in fact. Such intention seems very doubtful. Mention of persons for purposes of munificence is at best shadowy evidence that they are incidentally designated as measuring-rods. And though solicitous that his gift not fail, the testator would scarcely have opposed an interpretation which would protect his beneficiaries against their own improvidence even longer than these forty-two lives and twenty-one years. The lives of the inmates of the Kona orphanage (one of the annuitants) would doubtless have suited him better.

It may well be, therefore, that under guise of construction courts are unwittingly laying down a rule of law that where a future gift is to take effect at the remotest time the law will allow without further direction as to that time, coupled with a gift meanwhile of income, the court will remedy the uncertainty by looking to the will for lives with which to measure the period of postponement. Such a rule, if adopted, would reach a desirable result without even beneficent violence to the words of the will. It would be convenient, for the beneficiaries would remain so near to their annual payments that their decease would be speedily known. It would have analogy for its attitude toward uncertainty. A direction that a legatee be supported according to his condition in life is valid.⁸ A gift to two persons in such shares as a third shall appoint, will on failure of appointment be equally divided.⁹ A gift of income for as long a period as another shall appoint, and then of the *corpus* absolutely, would hardly be let fail for want of appointment.¹⁰ On the other hand, courts are indisposed to favor those who seek by general language to guard themselves against forbidden policies. Though a contract in reasonable restraint of trade is enforceable, a man cannot bind himself to refrain from a business "so long as the law allows." Such an agreement invites litigation and burdens courts.¹¹ Nor will a settlement of chattels to go with settled land "as far as law and equity permit" be construed as executory in order more perfectly to carry out the settlor's intent.¹²

⁶ *In re Moore*, [1901] 1 Ch. 936.

⁷ *Pownall v. Graham*, 33 Beav. 242.

⁸ *Broad v. Bevan*, 1 Russ. 511.

⁹ *Salisbury v. Denton*, 3 Kay & J. 529.

¹⁰ See *Holmes v. Walter*, 118 Wis. 409. Cf. 1 Jarman, Wills, 5 ed., *357 *et seq.*

¹¹ *Davies v. Davies*, L. R. 36 Ch. 359.

¹² *Vaughan v. Burslem*, 3 Bro. Ch. 101. See Gray, Rule Perp., 2 ed., §§ 365 *et seq.*

THE EFFECT OF FRAUD UPON INCORPORATION.¹—The effect of fraud practised in connection with alleged incorporation is usually raised by an attempt to impeach the corporation collaterally. The invulnerability of *de facto* corporations to collateral attack is generally conceded. May this doctrine, then, be invoked by an organization in answer to a charge that its attempted incorporation was vitiated by fraud?

Evidently no occasion arises for the consideration of this question unless there is failure to incorporate *de jure*. First, then, we must inquire whether the state itself may deny the effectiveness of proceedings attended by fraud. It is essential to distinguish between two types of fraud. (1) A statute requires the filing of a certificate in which shall be a statement that a certain proportion of stock is actually paid up. The incorporators file such a certificate with knowledge of its falsity. (2) A statute authorizes incorporation for purpose A. The incorporators organize in due form, but with the secret intent of using the corporation for the unauthorized purpose B. Suppose the fraud take the first form. If the corporation were chartered by a special legislative act, it might well be that the sovereign's *fiat* would create the corporation despite fraud inducing the creation. And although incorporation is now usually provided for under general enabling statutes, even in such cases if the statute expressly declare that some document, for instance the certificate of the Secretary of State, shall "have the force and effect of a special charter, and shall be conclusive evidence of incorporation,"² an entire failure to perform conditions prescribed by the statute would seem to be immaterial, and, *a fortiori*, fraud would be unimportant.³ There is, moreover, a decided tendency to give similar effect to much weaker statutes.⁴ It seems a fair construction, however, of a clause calling for certain declarations, that those declarations should at least be *bona fide*. It is believed, therefore, that, unless coerced by the statute, courts should deny *de jure* incorporation in cases where statements required by statute have been made with knowledge of their falsity.⁵ But suppose the fraud be of the second type, consisting merely in wrongful motive. If the statute have no express requirement in this regard, it seems reasonable to ascribe to the legislature a negative attitude in the matter, — a desire that the question of motive shall not be thrust upon the courts, which have frequently indicated their disinclination to involve themselves in it. And such seems to be the law.⁶ If the fraudulent motive result in fraudulent conduct, the state has an immediate remedy. And if the rights of third parties against such fraudulent organization be not sufficiently protected by appeal to the state official, relief might be furnished in the form of equitable injunction.

We may now consider whether, granting that fraud of the first type suggested has left the organization without *de jure* existence, it may yet invoke the *de facto* doctrine. Whether the reason underlying this doctrine be consideration for the *de facto* organization, or for the court, or some more general ground, it is conceived that it should yield before an attack based, not on

¹ For a discussion of the question whether the corporate entity should ever be disregarded after admittedly due incorporation, see NOTES, p. 223.

² Mass. Rev. L. 1902, c. 110, § 20.

³ Rice v. National Bank, 126 Mass. 300.

⁴ See Cochran v. Arnold, 58 Pa. St. 399.

⁵ See Paterson v. Arnold, 45 Pa. St. 410, overruled by Cochran v. Arnold, *supra*. See also Davidson v. Hobson, 59 Mo. App. 130.

⁶ Importing, etc., Co. v. Locke, 50 Ala. 332. But see Brundred v. Rice, 49 Oh. St. 640.

some technical, mechanical defect, but on allegations of fraud in those who seek protection behind the corporate shield.⁷ It must be admitted, however, that there is a somewhat general tendency in the authorities to disregard the distinction between technical oversights, on the one hand, and fraud, on the other.⁸ To this effect is a late Missouri Supreme Court decision. *First National Bank v. Rockefeller*, 93 S. W. Rep. 761. Such decisions may be accounted for on the supposition that the less frequent cause for collateral attack has been merged by courts in the rule admittedly applicable to the more frequent cause for such attack.

TENTATIVE QUALIFICATIONS OF THE DOCTRINE OF A SEPARATE CORPORATE ENTITY. — Although in our courts the apparently sound conception¹ of a corporation as an organic or psychological reality, separate and distinct from the natural persons composing it, does not obtain, yet, on the basis of a legal fiction, it is in general treated as such an entity. This entity can sue and be sued; be grantor and grantee; and have a continued existence and rights and obligations in contract or tort, wholly independent of those of the individual members.² The corporation cannot be confronted with a stockholder's admissions,³ nor can its property be attached for his debts.⁴ Not even a sole stockholder can convey,⁵ or sue to recover,⁶ corporate property in his own name; nor can the corporation utilize his credits as a set-off.⁷ Indeed, in the teeth of public policy, a ship owned by an English corporation composed partly of foreign members has been held entitled to registry "as wholly belonging to Her Majesty's subjects."⁸ Yet firmly established and variously applied as is the "fiction" of a corporate entity, a qualifying doctrine has been proposed that under some circumstances it be disregarded.

Of the authorities, many decisions, which only apparently involve heedlessness of the "fiction," must be eliminated from consideration. For example, the adjudications that conveyances to corporations composed of the insolvent grantors are fraudulent, rest not upon the basis that there is no real conveyance, but upon the strong evidence that the conveyances are only to the intent and effect of defrauding creditors.⁹ There must likewise be distinguished decisions resulting from *ultra vires* doctrines,¹⁰ and from the doctrine that a fraudulently formed corporation has no legal existence.¹¹ Moreover, the opinions in the Northern Securities case indicate no belief

⁷ *The Christian & Craft Grocery Co. v. Fruitdale Lumber Co.*, 121 Ala. 340.

⁸ See *Pattison v. Albany Bldg. & Loan Ass'n*, 63 Ga. 373.

¹ Cf. the German view, *Holtzendorff's Rechtslexikon*, tit. *Juristische Person*, § 943. See also 19 HARV. L. REV. 222.

² See *Mor., Priv. Corp.*, 2 ed., § 232.

³ *Fairfield, etc., Co. v. Thorp*, 13 Conn. 173.

⁴ *Williamson v. Smoot*, 7 Martin (La.) 31.

⁵ *Parker v. Bethel Hotel Co.*, 96 Tenn. 252.

⁶ *Button v. Hoffman*, 61 Wis. 20.

⁷ *Gallagher v. Germania, etc., Co.*, 53 Minn. 214.

⁸ *The Queen v. Arnaud*, 16 L. J. Q. B. (N. S.) 50. See also *Foster v. Commissioners of Inland Revenue*, [1894] 1 Q. B. 516.

⁹ See *Booth v. Bunce*, 33 N. Y. 139. But cf. *First, etc., Bank v. Trebein Co.*, 59 Oh. St. 316.

¹⁰ See *Mill v. Hawker*, L. R. 9 Exch. 309.

¹¹ See *Brundred v. Rice*, 49 Oh. St. 640; also NOTES, p. 222.

that the result hinged on disregarding the corporate entity;¹² and it is also noticeable that in questions of the jurisdiction of the federal courts over suits to which a corporation is a party, substantially the same result has been reached by conclusive presumptions as would logically follow the conception of a corporate entity.¹³ The distinction sometimes suggested, that law perceives only the corporate garb, while equity may "draw the veil,"¹⁴ not only has little in justice or logic to commend it, but seems so generally ignored by the authorities that it may be disregarded.¹⁵ Yet after all this is said, there undoubtedly remain many judicial statements that the corporate entity will sometimes be disregarded, and five or six decisions expressly to that effect,¹⁶—about half of them cases where the court is striving to give effect to a statute under which the state is pursuing the corporation for alleged illegal acts.

Although the numerous expressions of opinion may presage the ultimate adoption of the limiting doctrine, as yet the question surely remains *sub judice*.¹⁶ The most promising statement of the tentative qualifying doctrine seems to be that the "fiction" of a corporate entity will be disregarded "when urged to an intent and purpose not within the reason and policy of the fiction."¹⁷ Thus phrased, the qualification is apparently just and unobjectionable. Yet there seem to be weighty reasons for rejecting it. The merits of general and sharply defined rules of law need no encomiums. The proposed exception, by its specious generality, will tend to introduce additional elements of litigation-breeding uncertainty into the already chaotic corporation law. By what standards can it clearly be determined what is "within the reason and policy of the fiction"? A comparison of the cases where the entity has been observed with those where it has been suggested that it be disregarded, shows but too clearly how ragged would be the line of demarcation. Furthermore, there seems to be no urgent need of the innovation; for the "public inconvenience, wrong, fraud, or crime,"¹⁸ to prevent which the "fiction" is to be abjured, can almost always be reached through other legal principles. Take, for instance, the facts of a recent case where the court, fully maintaining the doctrine of a corporate entity, held that a corporation's promise not to engage in a certain business, assented to by its principal stockholders, bound neither them nor a new corporation formed by them.¹⁹ *Hall's Safe Co. v. Herring, etc., Co.*, 146 Fed. Rep. 37 (C. C. A., Sixth Circ.). Here the stockholders might readily have been bound by individual contracts, breaches of which equity would enjoin; and the new corporation might then very possibly be enjoined as a confederate in these illegal acts.²⁰ If in scattered instances suitable established legal remedies are lacking, the legislature, which has granted corporate powers, should be left to provide against abuse of them.

¹² See *Northern Securities Co. v. United States*, 193 U. S. 197.

¹³ See 1 Smith, *Cas. on Priv. Corp.*, 2 ed., 94-102.

¹⁴ See Mor., *Priv. Corp.*, 2 ed., § 227.

¹⁵ See *Ferguson v. Earl of Kinnoull*, 9 Cl. & F. 250; *State v. Standard Oil Co.*, 49 Oh. St. 137; *Sportsman, etc., Co. v. American, etc., Co.*, 30 Wkly. L. Bul. 87 (Cincinnati, Super. Ct.); *People v. North, etc., Co.*, 121 N. Y. 582; *United States v. Milwaukee, etc., Co.*, 142 Fed. Rep. 247.

¹⁶ In Ohio, however, the qualifying doctrine under discussion seems established. See Ohio cases, *supra*.

¹⁷ See 7 Am. & Eng. Encyc., 2 ed., 634.

¹⁸ See *United States v. Milwaukee, etc., Co.*, *supra*, 255.

¹⁹ Cf. *Moore, etc., Co. v. Towers, etc., Co.*, 87 Ala. 206.

²⁰ Cf. *Lewis v. Gollner*, 129 N. Y. 227.

POWER OF DIRECTORS TO APPOINT EXECUTIVE COMMITTEE. — An interesting question in the law of corporations is to what extent a board of directors may confide their powers to an executive committee. The right to delegate all their powers to such a committee, even though with the consent of the stockholders, would seem to be denied them by a dictum in a recent case. *Canada-Atlantic and Plant S. S. Co., Ltd. v. Flanders*, 145 Fed. Rep. 875 (C. C. A., First Circ.). On this point there is curiously little authority.

It is obvious that whether a board of directors may entrust their powers to an executive committee or not depends on the nature of their office. As to this, there are divergent views. One theory is that the directors are the agents of the stockholders to manage the business, and, as such, are unable to delegate their functions on the principle *delegatus non potest delegare*.¹ This view, however, seems unsound, for if it were true, the stockholders, being principals, could at any time take charge of the affairs of the corporation and manage them to suit their wishes. This, it is settled, they cannot do.² The other theory is that the directors represent the corporation completely, and can do what they as individuals within their own business could do. Hence, as principals, they can delegate the performance of acts which they themselves can perform.³ This view, likewise, is open to criticism. The directors have no common law powers as directors; they exercise merely granted powers.⁴ However discordant the authorities may seem, in the ultimate they agree that these powers are held by the directors in some sort of a fiduciary relation, and are to be exercised for the benefit of the stockholders after the analogy of a trust relation.⁵ It is axiomatic that a trustee may not delegate his duties as such to a third party, for it is the exercise of his judgment and his discretion which is required by the creator of the trust. It is believed that the same is true of directors.⁶ This being so, how far may they delegate their powers to an executive committee?

It may be admitted that, even in the absence of permission, the board of directors, however created, may delegate to agents or committees the doing of acts merely ministerial and the management of ordinary business, provided such business does not involve the exercise of executive functions regarding the "policy" of the corporation.⁷ The consent to delegate must be implied in such cases, for the directors in a large business are incapable of personally attending to its various details. It may also be admitted that if the statutes under which the corporation is organized, or its charter, contain provisions allowing the directors to entrust any or all of their duties to agents or committees, they may do so, for any duty to be exercised in a fiduciary relation may be delegated if the proper permission is given.⁸ And the same is true where the charter vests the management of the business in

¹ *Gillis v. Bailey*, 21 N. H. 149, 162.

² *Gashwiler v. Willis*, 33 Cal. 11. See 19 HARV. L. REV. 620.

³ *Jones v. Williams*, 139 Mo. 1, 26.

⁴ *Town of Royalton v. The Royalton and Woodstock Turnpike Co.*, 14 Vt. 311,

323.

⁵ *Cook v. The Berlin Woolen Mill Co.*, 43 Wis. 433; *In re Wincham Shipbuilding, etc., Co.*, 9 Ch. D. 322, 328.

⁶ *Perry v. Tuskaloosa Cotton Seed Oil Mill Co.*, 93 Ala. 364, 371.

⁷ *Andres v. Fry*, 113 Cal. 124; *The Pres., etc., of the Berks, etc., Turnpike Co. v. Myers*, 6 Serg. & R. (Pa.) 12.

⁸ *Totterdell v. The Fareham Blue Brick & Tile Co., Ltd.*, L.R. 1 C. P. 674; *Taylor v. The A. & M. Ass'n of West Ala.*, 68 Ala. 229.

the stockholders, who by by-laws create a board of directors and also consent to the delegation of powers to an executive committee.⁹ In all other cases, however, the power to delegate the duties of deciding the policy of the corporation and of generally overseeing its affairs should be denied. It is the exercise of the discretion and judgment of the directors for the benefit of the stockholders which is expected and required. It is their discretion and judgment that should be exercised.¹⁰

BY WHAT LAW DOMICILE IS DETERMINED. — Whatever force the laws of one country have in another depends solely on the laws of the latter.¹ Thus it is by virtue of their own laws that England² and most of the American states³ permit the movables of an intestate to descend according to the law of that country where the deceased was domiciled at the time of his death. The same is true of the general rule that, subject to some exceptions, the validity of a will, both in England⁴ and America,⁵ is determined by the law of the testator's last domicile. For this reason the foreign law is treated as a fact, and is proved as such.⁶ The result is, that while the territorial law of the state where the movables are situated is the only law which binds them, disposition of them will actually be determined by the law of the owner's last domicile.

Domicile of choice is an inference or conclusion which the common law draws from the fact of residence coupled with the appropriate intent. Both England and America agree on this point, though they differ as to the nature of the intent required.⁷ A recent English case, however, raises an interesting question. Does the law of that country where the deceased resided, or the law of that country where the movables are situated, determine where the deceased was domiciled? A British subject, born in England, had resided in France under such circumstances that the English law would deem him domiciled there, although he did not acquire a domicile which the French law would recognize. He died, leaving a will disposing of movables in England. The English court decided that both as to validity and construction the will should be governed by English law. *In re Bowes*, 22 T. L. R. 711 (Ch. D., July 18, 1906). The case follows without discussion a prior Chancery decision which, on similar facts as to the domicile of a Maltese person in Baden, decided that Maltese law governed the succession to the English movables of the intestate.⁸ Neither decision cited any authority on this point, but both proceeded on the apparently wrong assumption that the

⁹ *Union Pac. R. R. v. Chicago, R. I. & Pac. Co.*, 163 U. S. 564.

¹⁰ *Tempel v. Dodge*, 89 Tex. 68; *Weidenfeld v. Sugar Run R. R. Co.*, 48 Fed. Rep. 615; *Charlestown Boot & Shoe Co. v. Dunsmore*, 60 N. H. 85. *Contra*, *Hoyt v. Thompson's Executor*, 19 N. Y. 207; *Burrill v. Nahant Bank*, 2 Met. (Mass.) 163; *The Black River Improvement Co. v. Holway*, 85 Wis. 344.

¹ See Story, Conf. of Laws, §§ 18, 20, 23.

² *Crispin v. Doglioni*, L. R. 1 H. L. 301.

³ See *Wilkins v. Ellett*, 108 U. S. 256; *Lawrence v. Kittredge*, 21 Conn. 577.

⁴ *Goods of Maraver*, 1 Hagg. Eccl. 498; *Enohin v. Wylie*, 10 H. L. Cas. 1; *Whicker v. Hume*, 7 H. L. Cas. 123.

⁵ *Dupuy v. Wurtz*, 53 N. Y. 556; *Talbot v. Chamberlain*, 149 Mass. 57.

⁶ See *Bremer v. Freeman*, 10 Moore P. C. 306; *Haven v. Foster*, 9 Pick. (Mass.) 112.

⁷ *Udny v. Udny*, L. R. 1 H. L. Sc. 441; *Gilman v. Gilman*, 52 Me. 165; *Wilbraham v. Ludlow*, 99 Mass. 587.

⁸ *In re Johnson*, [1903] 1 Ch. 821.

domicile of the deceased was to be determined by foreign and not by English law. The main issue was the disposition to be made of English movables. By English law, which controlled the property, the domicile of the deceased was the determining fact. Obviously, therefore, the question of domicile should have been determined by English law. These two cases not only rest on no authority, but are opposed to two eminent text-writers,⁹ to the weight of the scanty American authority,¹⁰ and to prior and apparently controlling decisions in England, which seem to have been overlooked by court and counsel alike.¹¹ The true rule, therefore, appears to be that when the requisites of domicile, according to the *lex rei sitae*, exist, that law infers domicile, without regard to the law of the country where the deceased resided.

Another point in the prior Chancery decision⁸ is worth comment. The court suggests that, if it recognized the Baden domicile, it would then be bound to ascertain, not the Baden law of succession, but what territorial law of succession the Baden law would adopt under the circumstances, and then distribute these English movables accordingly. In other words, the court would apply first the English rule and then the Baden rule as to conflict of laws, in order to ascertain the rule of succession. This doctrine seems fundamentally wrong. It treats English movables, situated in England and controlled by English law, as if they were situated in Baden and controlled by Baden law. It reaches the right result only when the English and the foreign law adopt the same rule of succession, and then the application of the foreign law is superfluous. *Collier v. Rivaz*,¹¹ it is true, gives some support to this position, but the apparently controlling cases of *Bremer v. Freeman*¹¹ and *Hamilton v. Dallas*¹¹ are directly opposed.

DAMAGES AGAINST IMPROVER OF CONVERTED PROPERTY. — Both on authority and on legal theory there has been much doubt as to what measure of damages should be recovered from one who has wrongfully severed property from another's land and increased its value. The tendency has been to depart from the technicalities of the common law and to deal with the question on grounds of fairness and public policy. The cases which have arisen may be divided into four classes: where there are a *bona fide* plaintiff and a *bona fide* defendant; a *bona fide* plaintiff and a *mala fide* defendant; a *mala fide* plaintiff and a *bona fide* defendant; and a *mala fide* plaintiff and a *mala fide* defendant. Where the plaintiff has acted in good faith, the authorities are practically unanimous in making the *fides* of the defendant a determining factor. Against a *bona fide* defendant, a *bona fide* plaintiff has been allowed by different courts to recover the value of the property before severance from the land,¹ the value after severance,² and the enhanced value less the increase for which the defendant was responsible.³ This conflict is due to the fact that the courts have not generally proceeded according to what seems to be the true theory, —

⁹ Dicey, Conf. of Laws, 113; 1 Wharton, Conf. of Laws, 157.

¹⁰ *Harral v. Harral*, 39 N. J. Eq. 279. But see *Dupuy v. Wurtz*, 53 N. Y. 556, 570.

¹¹ *Collier v. Rivaz*, 2 Curt. Eccl. 855; *Anderson v. Laneville*, 9 Moore P. C. 325; *Bremer v. Freeman*, 10 Moore P. C. 306; *Hamilton v. Dallas*, 1 Ch. D. 257.

¹ *Forsyth v. Wells*, 41 Pa. St. 291.

² *White v. Yawkey*, 108 Ala. 270.

³ *Anderson v. Besser*, 131 Mich. 481.

namely, that a *bona fide* defendant should be entitled on quasi-contractual principles to the cost of his labor, so long as it does not exceed the total increase in the value of the property.⁴ On the other hand, a defendant who has acted in bad faith is generally held answerable to a *bona fide* plaintiff to the extent of the value of the property in its improved state.⁵ His bad faith of course prevents his receiving any quasi-contractual relief. The enhanced value of the property should be made the measure of damages, not for the purpose of punishing the defendant, but because that is the value to which the plaintiff is justly entitled, since the defendant, knowing the facts, must be taken to have made the improvements for the owner's benefit.

The exceptional situation of a *mala fide* plaintiff and a *bona fide* defendant arose in a recent Michigan case. *Gustin v. Embury Clark Lumber Co.*, 108 N. W. Rep. 650. The court allowed to be deducted from the enhanced value of the property the increase in value brought about by the defendant. The *mala fides* of the plaintiff was evidently considered, but on grounds of fairness it might well be urged that as the plaintiff consciously delayed suit he should recover only the value of the property before severance,⁶ thus losing any possible increase in value due to a rise in the market. The remaining combination of a *mala fide* plaintiff and a *mala fide* defendant was presented in a single case,⁷ in which damages were limited to the value of the standing timber. The case seems unsupportable, for neither on quasi-contractual principles nor on grounds of general fairness did the defendant deserve anything of the court. The plaintiff's like bad faith could not here affect his legal right, and the rule in the ordinary case of a *mala fide* defendant should apply.

If the doctrine of *Wetherbee v. Green*⁸ is ever extended to include the case of a *mala fide* converter, a new problem as to damages will arise. Since the defendant by sufficiently increasing the value of the property will have acquired title to it, to allow the former owner to recover from the new owner any value added to the property after title passed would be manifestly illogical. But neither should the defendant escape by paying only the value of the property at the time of the conversion, for, had he been sued immediately before title passed, he would have been compelled to pay the value at that time. It would therefore seem proper to compel him to pay the value of the property when he acquired title.

RES IPSA LOQUITUR BETWEEN MASTER AND SERVANT. — The doctrine of *res ipsa loquitur* has been most frequently applied in cases of injuries to passengers of common carriers and to persons on the highway who have been struck by some substance falling from an adjoining building. In the case of a servant injured in the course of his service there is much dispute as to whether the doctrine should be applied.¹ A recent case, where a servant was injured by the fall of an elevator, holds its application proper. *Fohn*

⁴ See *Trustees v. International Paper Co.*, 132 Fed. Rep. 92; 18 HARV. L. REV. 305.

⁵ *Cheaney v. Stone Co.*, 41 Fed. Rep. 740. See *Woodenware Co. v. United States*, 106 U. S. 432.

⁶ Cf. *Single v. Schneider*, 24 Wis. 299.

⁷ *Single v. Schneider*, 30 Wis. 570.

⁸ 22 Mich. 311.

¹ See *Highland Boy Mining Co. v. Pouch*, 124 Fed. Rep. 148.

Samuels, Adm'r v. John McKesson, Jr., 113 N. Y. App. Div. 497. Some of the carrier cases may be explained on the ground that the carrier is regarded as a quasi-insurer of its passengers' safety, and not upon the view that the accident itself makes a *prima facie* case.² And doubtless in the cases of pedestrians hit by a falling substance, there is an underlying principle that sound juridical policy requires a man so to use his property adjacent to the highway as not to endanger passers-by; so that in these cases negligence will be presumed until he who has all the evidence that would reveal whether the harm was culpable or innocent shall speak and explain it.³ But the essence of the doctrine itself is the effect to be given to a rather meager amount of circumstantial evidence, — whether the circumstances of a particular case are sufficient to raise a rebuttable presumption of negligence.

No sound reason can be urged why the doctrine should not extend to cases of master and servant. The maxim originated from the nature of the occurrence, and not at all from the relation of the parties.⁴ Many of the numerous decisions generally cited as *contra* to the above case show, when analyzed, not so much that the court was unwilling to apply the doctrine to master and servant, as that the special facts involved were not such as to present a proper situation for its application. Others show that the true ground of the decision was that the servant impliedly assumed the risk, and not that the maxim was inapplicable.

That this is a doctrine only of the quantity of circumstantial evidence required, is proved by the fact that there is no case where liability is predicated on the happening of the accident alone.⁵ The fact that the deceased was killed beside a building by a brick does not make a *prima facie* case. But if the proof of circumstances goes enough further to show that he was a pedestrian on the street, that the brick fell from a neighboring building, and that the defendant was the owner of the building, the onus then devolves upon the defendant to go forward with evidence to disprove negligence.⁶ And so it would be a complete perversion of the doctrine to hold a railway company liable when the proof shows only that a man who was not a passenger was found dead in the morning, killed by a passing train; because there the circumstances go no further than to show a presumption at least equally as strong that he was negligent in not avoiding the train as that the engineer was negligent in not avoiding him.⁷ The doctrine, therefore, should be applied only where the conditions are such that a fair-minded man would say that if the instrument of the injury were properly examined and operated, the accident in all probability would not have happened; where the instrument is within the defendant's control, and he has both user and inspection; and where the injury occurs irrespective of any contributory act of the plaintiff or of a third person.⁸ Of course, the relation of the parties to each other may be in itself a very important circumstance in determining whether the facts of a particular case call for the application of the doctrine. But it seems right, in the absence of public policy, to hold that the relation of master and servant, or any other relation, does not prevent as a matter of law the application of the maxim.

² *Osgood v. Los Angeles Traction Co.*, 137 Cal. 280. Cf. 16 HARV. L. REV. 227.

³ See *Hawser v. Cumberland & P. Rd. Co.*, 80 Md. 146.

⁴ *Guldseth v. Carlin*, 46 N. Y. Supp. 357. Cf. 18 HARV. L. REV. 391.

⁵ See *Murphy v. Great Northern Ry. Co.*, 68 Minn. 526.

⁶ *Byrne v. Boadle*, 2 H. & C. 722.

⁷ *Church, Adm'r v. Northern Pac. Rd. Co.*, 31 Fed. Rep. 529.

⁸ See 4 Wig., Ev., § 2509.

RECENT CASES.

AGENCY — EFFECT OF STATUTES ON RELATION — MASTER'S LIABILITY TO PROVIDE SAFE PLACE TO WORK. — A Tennessee statute required the employment of a licensed foreman in every mine; conferred on such foreman control of specified parts of the operation of the mine; relieved him from the control of the owner; and imposed penalties to secure faithful service by him. The plaintiff, one of the defendant's miners, was injured by a fall of slate from the roof of the room in which he was working, due to the negligent performance by the foreman of a duty imposed by the statute. The foreman was duly licensed and competent. *Held*, that the plaintiff cannot recover. *Sale Creek Coal & Coke Co. v. Priddy*, 96 S. W. Rep. 610 (Tenn.).

The mere fact that statutes require certain employees to be licensed, thereby limiting the employer's field of selection, does not prevent such employee from being a servant for whose negligence the master is liable. *Martin v. Temperley*, 4 Q. B. 298. But this statute goes further. By removing from the mine-owner the right of control over details, it changes his foreman from his servant, as he otherwise would be, to an independent contractor. Cases such as this are rare, and the courts have not always realized the true relation of the parties. See *Durkin v. Kingston Coal Co.*, 171 Pa. St. 193. A master, however, by employing an independent contractor cannot divest himself of his liability to provide his servants with a safe place to work. *Herdler v. Buck's Stove Co.*, 136 Mo. 3. Employing a foreman prescribed by statute should not be enough to relieve him from such liability. *Smith v. Drayton Co.*, 115 Tenn. 543; *contra*, *Williams v. Thacker Coal Co.*, 44 W. Va. 599. Whether this statute in giving control of certain matters to an independent contractor relieves the owner of such liability *pro tanto*, the court does not consider, and the question must be considered as open. We may support the decision by saying that a room in a mine is not a place provided for work, but a temporary instrumentality, as a scaffolding or ditch. *Coal & Mining Co. v. Adm. of Clay*, 51 Oh. St. 542.

AGENCY — LIABILITY OF PRINCIPAL TO THIRD PERSONS IN TORT — STOCK CERTIFICATE FORGED BY SECRETARY OF COMPANY. — The secretary of a company, acting for private purposes, forged a certificate of shares in the company. The certificate was perfectly regular in form, sealed with the seal of the company, and attested with the signatures of two directors, which signatures were forged. *Held*, that persons who, relying on the certificate, have advanced money to the secretary cannot recover from the company, and that the company is not estopped from denying the invalidity of the certificate. *Ruben & Ladenburg v. The Great Fingall Consolidated Co.*, 95 L. T. R. 214 (Eng., H. L., July 19, 1906).

For a discussion of this case in the lower court, see 18 HARV. L. REV. 144.

AGENCY — PRINCIPAL'S RIGHTS AGAINST AGENT — LIABILITY FOR AMOUNT OF SECURITIES FALSELY DECLARED BY AGENT TO REPRESENT INVESTMENT OF PRINCIPAL'S MONEYS. — The defendants' testator, the executor of a will, was appointed by the plaintiffs their attorney in fact to keep invested the sums due them as beneficiaries under the will. He falsely represented to them in his accounts that he held these sums invested in certain mortgages, and regularly paid them money as interest thereon. The accounts were accepted by the plaintiffs, and the representations believed. *Held*, that the defendants are liable for the amounts represented by such alleged investments. *Hartmann v. Schnugg*, 35 N. Y. L. J. 943 (N. Y., App. Div., June, 1906).

For aught that appears, the testator had cared for the plaintiffs' moneys with due fidelity. Hence his estate would be liable to account only for that property of the plaintiffs which he actually had, unless the root of a further liability is found in his misrepresentations. Although the court gives no reasons and cites no authorities, yet its decision seems to be reached by enforcing an equitable estoppel, inasmuch as the liability imposed on the testator's estate is coincident

with the liability which would have been imposed had the representation been true. The elements of estoppel by misrepresentation may be outlined thus: a misrepresentation as to present or past facts, wrongfully made with foresight of or reason to foresee another's acting upon it, and in fact believed and prejudicially acted upon by that other. See *EWART, ESTOPPEL*, 10. In the present case the essentials are undoubtedly complete, if the plaintiffs changed their position prejudicially, — a point ignored in the court's statement of facts. Relative change of position, however, might well be found in the plaintiffs' allowing their moneys to remain under the testator's control. See *Continental, etc., Bank v. Nat'l Bank*, 50 N. Y. 575, 584; *cf. Skyring v. Greenwood*, 4 B. & C. 289. Moreover, very slight damage has been held sufficiently to prejudice the deceived party. See *Knights v. Wiffen*, L. R. 5 Q. B. 660, 665; also 19 HARV. L. REV. 113.

APPEAL AND ERROR — DETERMINATION AND DISPOSITION OF CAUSE — DECISION BY DIVIDED COURT. — On appeal in a personal injury case, where the questions involved in the appeal related to the accuracy of the lower court's instructions, two justices considered the instructions erroneous and also a ground for a new trial. Of the two remaining justices, both of whom opposed the granting of a new trial, one did so on the ground that the appellant's case was not prejudiced, though admitting that, as matter of law, there was error. *Held*, that the appeal should be allowed. *Hawley v. Wright*, 39 Nova Scotia 1.

It is a well-recognized rule that when an appellate court stands equally divided the decision appealed from shall be left in *statu quo*. The exception involved in the present case is perhaps due to the fact that, although on the final question as to whether or not a new trial should be granted, there was an equal division, the legal error committed by the lower court was conceded by a majority.

APPEAL AND ERROR — WAIVER OF RIGHT TO PROSECUTE SECOND APPEAL — In an action to compel the defendant to repair a street and to rebuild sidewalks, the lower court granted the relief demanded except as to the sidewalks. The defendant appealed from the unfavorable part of the decree, and it was affirmed. The plaintiff thereafter appealed from the remainder of the decree. *Held*, that a motion to dismiss the appeal be denied. *State v. Northern Pac. Ry. Co.*, 109 N. W. Rep. 238 (Minn.).

This decision is based on the construction of a statute permitting either party to appeal from the portion of a judgment which he deems erroneous, and on a rule of court. Under such a statute, unless the respondent could and should have presented and had corrected on the first review the errors of which he now complains, the second appeal is of course proper. *Page v. People*, 99 Ill. 418. The majority view, with which this case agrees, is that the right to cross-assign errors on the first appeal, which is quite generally given either by rule of court or by common practice, is permissive and not obligatory. *Guarantee Co. v. Insurance Co.*, 124 Fed. Rep. 170. A better view is that if the whole record has been once before the court, and the present appellant could have filed cross-assignments of error, it was his duty to do so, and in default thereof he waived his right to appeal. *Scully v. Smith*, 66 Kan. 265. This prevents multiplicity of suits, doubling the costs, and simplifies procedure. *Horne v. Harness*, 18 Ind. App. 214. If, however, the decision correctly interprets the Minnesota rule of court as not permitting cross-assignments of error, the case may be sustained on that ground.

BANKRUPTCY — PROVABLE CLAIMS — COUNTERCLAIM AFTER EXPIRATION OF ONE YEAR. — In a suit by a trustee in bankruptcy, begun more than a year after the adjudication, the debtor endeavored to diminish or defeat the claim by pleading a claim for damages for breach of contract by the bankrupt before his bankruptcy. *Held*, that the claim may be proved by way of counterclaim. *Norfolk & W. R. Co. v. Graham*, 16 Am. B. Rep. 610 (C. C. A., Fourth Circ., May, 1906).

§ 57 n of the Bankruptcy Act of 1898 limits the time within which claims may be proved against the estate to one year from the adjudication. § 68 b (1) of the Act provides that a set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt, which is not "provable" against the estate. In the former Act of 1867 the corresponding phrase used was "in its nature provable." The change has caused some speculation, but it seems agreed that the new language has substantially the same meaning as the old. *Morgan v. Wordell*, 178 Mass. 350. There are a few expressions to be found that provability depends upon the status of the claim at the time of filing the petition. See *In re Bingham*, 94 Fed. Rep. 796. The weight of authority, however, is that "provable" means provable in its nature at the time when the counterclaim or set-off is filed. See *Morgan v. Wordell*, *supra*.

BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — CONDITIONAL CREDIT TO DEBTOR AS CONSIDERATION. — A negotiable certificate of deposit issued by the X bank and endorsed by the depositor in blank, was delivered by him to the A bank for collection. By the A bank it was given to the B bank, which transferred it to the plaintiff C bank, its creditor, and the latter credited the B bank on its books. The C bank sued the X bank and the depositor. *Held*, that, since the credit given was conditional and not absolute, there can be no recovery, even under the Negotiable Instruments Law. *Commercial Nat'l Bank v. Citizens' State Bank*, 109 N. W. Rep. 198 (Ia.).

The Negotiable Instruments Law provides that an antecedent or pre-existing debt shall constitute value. The argument relied on by the court to take this case out of the provisions of the statute is that, if the instrument were dishonored, recourse could be had to the original obligation from the B bank to the plaintiff, and the credit given was therefore conditional. This is true, but in every case credit for negotiable paper is in this sense conditional, and it is clearly the intention of the statute to cover such cases. If the fact were that the plaintiff knew that the certificate of deposit was deposited originally for collection, the result reached would be correct. In such a case the plaintiff would have been in the position of a trustee or agent. *Peck v. First Nat'l Bank*, 43 Fed. Rep. 357. One of the cases cited seems to suggest that something of this sort may have been in the court's mind. *Old Nat'l Bank v. German Bank*, 155 U. S. 556. But if so, the entire discussion on which the court relies would be unnecessary.

CARRIERS — DELAY — DUTY TO INFORM PASSENGERS OF CIRCUMSTANCES LIKELY TO CAUSE DELAY. — The plaintiff was travelling from Jacksonville to Columbia *via* Savannah on the defendant railroad. The defendant knew there were quarantines at both Savannah and Columbia. In response to inquiries the plaintiff was informed about the latter, but nothing was said of the former. *Held*, that the plaintiff can recover for delay caused by the Savannah quarantine. *Hasseltime v. Southern Ry. Co.*, 55 S. E. Rep. 142 (S. C.).

The defendant can be held on the ground that it has a duty, at least in reply to inquiries, to give passengers information necessary for their journey. *Dwinelle v. N. Y. C., etc., R. R. Co.*, 120 N. Y. 117. Also, the failure to mention the situation at Savannah was practically the same as saying that there was no quarantine there. This would bring the case under a rule more frequently applied, that passengers can rely upon information given them by the carrier. *Penna. Co. v. Hoagland*, 78 Ind. 203. The American courts seem to hold that the carrier assumes both the above obligations as an incident to its business. This seems just. England has worked out liability for giving false information on the analogy of deceit. *Denton v. Great Northern Ry. Co.*, 5 E. & B. 860. A similar rule prevails as to carriers of goods. If a railroad takes freight knowing it will be delayed by press of business or some similar cause, it is liable for the delay. *Thomas v. Wabash, etc., Ry. Co.*, 63 Fed. Rep. 200. Some jurisdictions limit this rule to cases where the shipper does not know of the circumstances at the time of shipment. *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297.

CONFLICT OF LAWS — SUCCESSION — BY WHAT LAW DOMICILE DETERMINED. — A British subject, born in England, acquired in France a domicile of choice in fact, though he never acquired a legal domicile in the manner prescribed by French law. He died in France, leaving a will disposing of English movables. *Held*, that as to validity, construction, and administration, the will is governed by English law. *In re Bowes*, 22 T. L. R. 711 (Eng., Ch. D., July 18, 1906). See NOTES, p. 226.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — SELF-INCRIMINATION IN CONTEMPT PROCEEDINGS. — The defendant had been restrained from committing acts of boycott against the plaintiff, and had disobeyed the injunction. On an order to produce its records in contempt proceedings the defendant claimed exemption under the constitutional provision that "no person shall in any criminal case be compelled to be a witness against himself." *Held*, that when contempt proceedings are to vindicate an essentially civil right, the constitutional provision does not apply. *Patterson v. Wyoming Dist. Council*, 31 Pa. Super. Ct. 112.

The distinction between contempt proceedings criminal and civil has long been recognized. 4 BLACK., COMM., 285. Those instituted solely to vindicate the dignity of the court are punitive and criminal, while those instituted by individuals for the purpose of protecting or enforcing some right are remedial and civil. *Thompson v. Penna. Ry. Co.*, 48 N. J. Eq. 105. The cases making this distinction have in general involved the existence of criminal intent, and it has been held unnecessary to find such intent in contempt proceedings civil in nature. *Indianapolis Water Co. v. American Strawboard Co.*, 75 Fed. Rep. 972. The court here seems justified in going a step further and applying the distinction to the rule against self-incrimination. The Fifth Amendment is interpreted as applying to cases criminal in nature though civil in form; — *e. g.*, in civil proceedings to collect a statutory penalty the defendant is protected. *Boyd v. United States*, 116 U. S. 616. The reverse should also be true, and if the proceedings are civil in nature and purpose, though criminal in form and punishment, the defendant should not be allowed immunity. Such is the case here, for contempt proceedings to discover and punish the violation of an injunction are in the nature of civil attachments. *People v. Court of Oyer and Term.*, 101 N. Y. 245.

CONTRACTS — ANTICIPATORY BREACH — APPLICATION TO INSURANCE CONTRACTS. — The plaintiff sued the defendant corporation for damages for breach of contract, alleging that the defendant had broken the contract to insure his life by declaring it void and forfeited. *Held*, that the plaintiff has no right of action before the time for performance by the defendant has arrived. *Kelly v. Security, etc., Ins. Co.*, 36 N. Y. L. J. 109 (N. Y., Ct. App., Oct. 2, 1906).

The doctrine of anticipatory breach has been regarded as in force in New York. See *Ferris v. Spooner*, 102 N. Y. 10. And the court in the present case acknowledges its establishment, but refuses to extend it to insurance contracts. There seems to be no reason for making such a contract an exception to the rule. It is hard to imagine any class of contracts where the argument of the practical convenience of a present action applies with as much force as in life insurance contracts. And the doctrine has been applied to these contracts elsewhere. *O'Neill v. Supreme Council*, 70 N. J. L. 410. But the present court seems strongly affected by the analogy to promissory notes, to which the application of the doctrine has been denied. *Benecke v. Haebler*, 38 N. Y. App. Div. 344. It has also been denied application where one side of a contract has been executed. *Flinn v. Mowry*, 131 Cal. 481. But since the present case is not analogous to these established exceptions, the policy not being paid up, it seems to indicate another halt in the logical extension of an illogical rule. In insurance cases, however, granting the above, recovery may well be allowed on other grounds. See 17 HARV. L. REV. 46.

CORPORATIONS — DE FACTO CORPORATIONS — COLLATERAL ATTACK ON GROUND OF FRAUD IN INCORPORATION. — The defendants were shareholders

in an organization purporting to have been incorporated under the general laws of Missouri. The plaintiff, suing on a note of the organization, attempted to hold them to individual liability on the ground that the incorporation was fraudulent and void, in that the statements required by the statute as to capital stock subscribed and paid in, though made in due form, were knowingly false. *Held*, that in such an action the validity of the incorporation cannot be attacked on the ground of fraud. *First National Bank v. Rockefeller*, 93 S. W. Rep. 761 (Mo., Sup. Ct.). See NOTES, p. 222.

CORPORATIONS — DIRECTORS AND OTHER OFFICERS — POWER OF DIRECTORS TO APPOINT EXECUTIVE COMMITTEES. — The stockholders of the appellant corporation by a by-law authorized their board of directors to appoint from among themselves an executive committee, with the full powers of the board when the latter was not in session. The board did so create an executive committee. *Semble*, that the board, though authorized as it is, cannot legally create such a committee. *Canada-Atlantic and Plant S. S. Co., Ltd. v. Flinders*, 145 Fed. Rep. 875 (C. C. A., First Circ.). See NOTES, p. 225.

CORPORATIONS — DISTINCTION BETWEEN CORPORATION AND ITS MEMBERS — BINDING EFFECT ON STOCKHOLDERS OF CONTRACT MADE BY CORPORATION. — The X corporation, with the assent of the individual defendants, its principal stockholders, sold all of its property, including good will, to the plaintiff, and covenanted that it would no longer engage in the same business. The individual defendants with others thereafter formed the defendant corporation, which proceeded to carry on that same line of business. *Held*, that neither the individual defendants nor the defendant corporation is precluded from so doing by the contract of the X corporation. *Hall's Safe Co. v. Herring, etc., Co.*, 146 Fed. Rep. 37 (C. C. A., Sixth Circ.). See NOTES, p. 223.

CORPORATIONS — FOREIGN CORPORATIONS — LIABILITY OF FOREIGN CORPORATION TO INCOME TAX. — The English Income Tax Act of 1853 provided that any person residing in the United Kingdom should be taxed on his annual gains or profits, etc. The defendant, a foreign corporation, was registered in South Africa, but "kept house and did its real business" in London. *Held*, that it is "resident" in England within the meaning of the Act, and is liable to taxation on its entire net income thereunder. *De Beers, etc., Mines, Ltd. v. Howe*, [1906] A. C. 455.

In America, by the great weight of authority, a corporation cannot exist where the law which creates it does not operate. *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 588. It cannot, therefore, be served or sued in another state, except by its own consent. *St. Clair v. Cox*, 106 U. S. 350. A state may not lay a personal tax on one not domiciled therein. *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300. But it may tax, as tangible personalty, income received within its jurisdiction by a foreign corporation. *Liverpool, etc., Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566. In substance, therefore, the American rule seems to be that a state may tax the property, but not the person of a foreign corporation. In England, however, the courts have already broken over the theory that a corporation cannot exist outside the state of its creation. A foreign corporation doing business in England may, apparently irrespective of consent, be served and sued. *Newby v. Van Oppen, etc., Co.*, L. R. 7 Q. B. 293; "*La Bourgogne*," [1899] A. C. 431. The theory is that the corporation, by doing business therein through agents, becomes to that extent at least "resident" in England. The present case carries out the doctrine so as to render the corporation liable to a personal tax. If a foreign corporation be held to exist for purposes of suit and personal taxation, it would seem difficult, logically at least, to deny its legal existence for any purpose. *Cf.* 20 HARV. L. REV. 78.

COVENANTS RUNNING WITH LAND — CONDITION IN EXECUTORY CONTRACT FOR SALE OF LAND. — The owners of certain land contracted to convey part of it to the defendant, with the express condition that the latter should build a fence on its eastern side before taking possession. Later, the

vendor granted his land bordering on the eastern line of this tract to the lessor of the plaintiff. The defendant entered without constructing a fence, and began to build a railroad. The plaintiff brought action to recover the value of a cow which had been killed owing to the defendant's failure to fence. *Held*, that the condition to fence is a covenant running with the land and that the plaintiff is entitled to recover. *Indianapolis, etc., Co. v. Harbaugh*, 78 N. E. Rep. 80 (Ind., App. Ct.).

Oral agreements will not be construed as covenants running with the land. *Morss v. Boston, etc., Co.*, 2 Cush. (Mass.) 536. And an unsealed written contract to fence has been held to bind only the parties to it. *Vandegrift v. Delaware R. R. Co.*, 2 Houst. (Del.) 287. But stipulations in deeds poll not signed by the grantees are held binding on future grantees. *Post v. West Shore R. R. Co.*, 50 Hun (N. Y.) 301; *contra*, *Pearson v. Bailey*, 177 Mass. 318. And it is not fatal that the covenant is not mentioned in the deed, if it is part of the same transaction. *Hills v. Miller*, 3 Paige (N. Y.) 254. But in all these cases there was a grant from the covenantee to the covenantor, creating a privity of estate. Without privity of estate there can be no covenant running with the land. *Hurd v. Curtis*, 19 Pick. (Mass.) 459. In the present case there is neither a covenant in the true sense, since the writing was unsealed, nor has there been any conveyance between the covenantee and the covenantor so as to create privity of estate. It is difficult to perceive any grounds upon which to support the decision. *Cf. Moxley v. New Jersey, etc., Co.*, 21 N. Y. Supp. 347.

CRIMINAL LAW — TRIAL — ABSENCE OF ACCUSED THROUGH MISCONDUCT. — The defendant, indicted for a misdemeanor, when brought into court to plead so misconducted herself that it was impossible to take her plea. She was twice removed and informed that if she persisted in her misbehavior she would be tried in her absence. A plea of not guilty was entered for her in her absence. The jail surgeon, being summoned, said that the defendant was quite sane and capable of understanding the nature of the charge and proceedings against her. The defendant was then tried, convicted and sentenced in her absence. *Held*, that such procedure is valid. *Rex v. Mary Browne*, 70 J. P. 472 (Eng., Cent. Crim. Ct., Sept. 14, 1906).

A defendant indicted for a misdemeanor punishable by imprisonment, as in the principal case, is entitled to plead in person at his arraignment and to be present throughout his trial. *Rose v. State*, 20 Oh. St. 31; see BISHOP, NEW CRIM. PROCEDURE, § 268. But if it is impossible for him to be brought into court because of insanity, or if he misbehave so as to stop proceedings, he loses his right to be present, and the arraignment and trial may be conducted in his absence. *United States v. Davis*, 6 Blatchf. (U. S.) 464. Though the principal case is sound on this latter point, it is objectionable because of the way in which the plea was entered. In cases where the defendant stands mute on arraignment, as did the defendant in the present case, the correct procedure at common law is for the court to empanel a jury to determine whether the accused stands mute through malice or by act of God. *Reg. v. Israel*, 2 Cox C. C. 263. If the former is found to be true, then, under the English Statute of 7 and 8 Geo. IV, c. 28, § 2, the judge may enter a plea of not guilty. The entering of such a plea before such a determination by the jury was clearly unwarranted.

DAMAGES — MEASURE OF DAMAGES — GOOD WILL. — The plaintiff sued the defendant for fraudulently inducing him to sell stock in an unlisted corporation at an inadequate price. *Held*, that the good will of the corporation is an element to be considered in estimating the damages, and that the value of such good will can fairly be estimated by multiplying the average annual net profits by a number of years suitable with reference to the particular business; the determination of such number of years to be submitted to the jury as a question of fact. *Von Au v. Magenheimer*, 100 N. Y. Supp. 659.

This seems to be the first case to lay down any general rule for the valuation of good will. *Cf. Mellersh v. Keen*, 28 Beav. 453; *Page v. Ratliffe*, 75 L. T. R. 371. From one American case it seems a necessary inference that the good will of a

listed corporation is the difference between the amount actually invested and the market price of the stock. *Adams Express Co. v. Kentucky*, 166 U. S. 171. But this rule is not applicable to unlisted stock. The rule in the case at hand is equally useless. The jury being allowed to use as a multiplier any number of years not inconsistent with the character of the business, is in no better position than if simply instructed to assess the good will. A simple and definite rule would be to deduct from the net annual profits such proportion as might be a reasonable return on the capital invested, considering the nature of the business, and then capitalize the remaining profits at a rate of interest conformable to the risks of the business. However, since this is essentially a question of fact, it may be doubted whether the court should attempt to lay down any rule at all.

DAMAGES — MEASURE OF DAMAGES — IMPROVEMENTS TO CONVERTED PROPERTY. — The defendant cut timber from the plaintiff's land under a *bona fide* belief that the land was the defendant's. The plaintiff waited until the defendant had considerably increased the value of the timber and then exercised his right under the statutory action of replevin to recover damages instead of the property itself. *Held*, that the measure of damages is the enhanced value of the property, less any increase added by the defendant after conversion. *Gustin v. Embury Clark Lumber Co.*, 108 N. W. Rep. 650 (Mich.). See NOTES, p. 227.

EASEMENTS — MODES OF ACQUISITION — IMPLIED GRANT OF RIGHT OF WAY. — A testator built four houses with a passage at the back to connect them with the street. There was also access from the front. The houses were devised without any mention of a right of way. *Held*, that a right of way will be implied in favor of the devisees and their successors in title. *Milner's Safe Co. v. Great Northern & City Ry. Co.*, 95 L. T. R. 321 (Eng., Ch. D., July 17, 1906).

Where there has been an apparent and continuous use of an estate retained in favor of an estate conveyed away, such use will ordinarily be held to pass to the grantee under the doctrine of an implied grant, when no mention is made of it in the deed. *Ellis v. Bassett*, 128 Ind. 118. Many jurisdictions, however, distinguish in the case of a right of way on the ground that the use, since it requires the intervention of human agency, cannot be continuous. *Morgan v. Meuth*, 60 Mich. 238. Such a distinction seems arbitrary. The real considerations should be whether the use is apparent, and was intended as a permanent benefit for the part conveyed away. *Baker v. Rice*, 56 Oh. St. 463. Judged by these requisites the decision in the principal case is sound. The result is surely desirable, and is in accord with the weight of authority in England. *Brown v. Alabaster*, 37 Ch. D. 490; *contra*, *Thomson v. Waterlow*, L. R. 6 Eq. 36. In this country the tendency of the decisions is in the opposite direction, the idea being that the doctrine of implied grant is against the spirit of our registry laws. *Whiting v. Gaylord*, 66 Conn. 337. But this reasoning applies to all classes of easements as well as to rights of way.

EQUITY — PRIORITY OF EQUITIES — RIGHT OF DEFRAUDED JUDGMENT DEBTOR AGAINST BONA FIDE PAYEE OF JUDGMENT PROCEEDS. — The beneficiary of an insurance policy obtained a judgment thereon by fraud, the amount of which was paid into court. By order of the fraudulent judgment creditor the clerk of court paid a portion of this very money to the defendants, who took in good faith and for value. The judgment debtor, having discovered the fraud, filed a bill in equity to restrain the defendants from setting up the fraudulent judgment, and to compel repayment of the money received thereunder. *Held*, that, even though the judgment be fraudulent, the equities of the plaintiff and defendants are equal, and hence the latter, in whom is the legal title, prevail. Two justices dissented. *Fidelity Mutual Life Ins. Co. v. Clark*, U. S. Sup. Ct., Oct. 29, 1906.

Where a plaintiff, upon the ground of an alleged equity, proceeds against one who has the legal title, he must show as the gist of the action, whether it be quasi-contractual or in equity, that it is against good conscience for the de-

fendant to retain the *res*. *Haven v. Foster*, 9 Pick. (Mass.) 112; *Dean v. Anderson*, 34 N. J. Eq. 496. If the defendant received the legal title in good faith, but without giving value, it is unjust that he should make a profit at the plaintiff's expense. *Haven v. Foster*, *supra*. If the defendant received the legal title with notice of the plaintiff's equity, his conscience is charged with that equity, even though he gave value. *Mackreth v. Symmons*, 15 Ves. 329. If, however, the defendant took title for value and without notice, the plaintiff cannot prevail. *Cave v. Cave*, 15 Ch. D. 639. In such a case, since the equities of both parties are equal, the court refrains from interference, leaving the loss where it has fallen. *Price v. Neal*, 3 Burr. 1354. In the case at hand the title to the money passed to the judgment creditor, and from her to the defendants for value and without notice. The plaintiff, therefore, shows no ground for relief.

ESTOPPEL — ESTOPPEL IN PAIS — OBJECTION TO COURT'S JURISDICTION. — The defendant in a suit in equity filed a cross-bill asking for affirmative relief, which was granted. The plaintiff appealed, and the defendant urged that the bill should be dismissed because the court did not have jurisdiction on account of the smallness of the amount involved. *Held*, that the defendant is estopped from setting up the court's lack of jurisdiction. *Champion v. Grand Rapids, etc., Ry. Co.*, 108 N. W. Rep. 1078 (Mich.).

Extending the court's jurisdiction by estoppel in such instances would seem to be incorrect. See 20 HARV. L. REV. 150.

FEDERAL COURTS — JURISDICTION BASED ON NATURE OF SUBJECT-MATTER — FEDERAL JURISDICTION UNDER WAR AMENDMENTS. — § 5508 of the United States Revised Statutes prohibits conspiracy to intimidate any citizen in the free exercise of any right secured by the Constitution or laws of the United States. Under this statute the plaintiffs in error were indicted for coercing certain negroes into abandoning their contracts. *Held*, that the indictment is demurrable, as the federal courts have no jurisdiction of the wrong charged. *Hodges v. United States*, 27 Sup. Ct. Rep. 6.

The dissenting opinion suggests that the case may involve a decision that § 5508 of the Revised Statutes is unconstitutional. Though the court does not clearly specify its ground of decision, it is obvious that the alternative view, that the case is not within the statute, is the true basis of the holding of the court. The constitutionality of the statute itself is beyond doubt. *Ex parte Yarborough*, 110 U. S. 651. The real problem which the case presents, then, is whether the right in question here is a right secured by the Constitution or laws of the United States. If it be so secured, it is admittedly so only under the Thirteenth Amendment, — the Fourteenth referring only to state acts. It has been held in elaborate circuit court opinions that the Thirteenth Amendment forbidding slavery protects rights similar to those involved here, on the ground that the infringement of such rights is the imposition of a "badge" or incident of slavery. *United States v. Rhodes*, 1 Abb. (U. S.) 28; *United States v. Morris*, 125 Fed. Rep. 322. The present case apparently overrules these cases, and at least checks their tendency toward perhaps a strained construction of the Thirteenth Amendment. *Cf. United States v. Harris*, 106 U. S. 629.

HABEAS CORPUS — RIGHT OF APPEAL — PROCEEDINGS BETWEEN CLAIMANTS FOR CUSTODY OF CHILD. — In *habeas corpus* proceedings the plaintiff had been ordered to give up the possession of a child and had moved for a new trial. The defendant judge having refused to consider the motion, the plaintiff applied to the Supreme Court for a writ of *mandamus* to compel the defendant to pass upon it. *Held*, that the *mandamus* may issue since the judgment is appealable. *Bleakley v. Smart, Judge*, 87 Pac. Rep. 76 (Kan.).

Generally, except by statute, a judgment in *habeas corpus* is neither *res judicata* nor subject to review. *Skinner v. Sedgbur*, 8 Kan. App. 624; *contra*, *State ex rel. McCaslin v. Smith*, 65 Wis. 93. An exception to this rule is generally made when the petition concerns the custody of an infant. *People ex rel. Green v. The Court of Appeals*, 27 Colo. 405; *contra*, *Mathews v. Hobbs*,

51 Ala. 210. In such a case the alleged restraint may be illegal, either because it deprives the child of liberty or because it is imposed by one not legally entitled to the child's custody. Logically, in *habeas corpus* the latter wrong should be considered only as it is presumed to affect the former. See *The State ex rel. Baird v. Baird and Torrey*, 19 N. J. Eq. 481. Practically this distinction is so difficult to make that *habeas corpus* becomes a means of settling the claims of parents and guardians generally. *Cormack v. Marshall*, 211 Ill. 519. Since the proceedings have assumed this character, the present case seems right in holding the judgment reviewable, because the real liberty of the child is sufficiently protected by allowing a new writ upon any change of circumstances which might be presumed to restrain the child's liberty. *In re King*, 66 Kan. 695.

INFANTS — CONTRACTS — EFFECT OF FALSE REPRESENTATIONS AS TO AGE. — The defendant, an infant, executed a trust deed to the plaintiff as part consideration for the sale of a livery business. The defendant appeared over twenty-one years old and expressly stated that he was of age. *Held*, that on account of the fraud the infant cannot set up his age as a defense in an action to enforce the deed of trust. *Commander v. Brazil*, 41 So. Rep. 497 (Miss.).

While this case is in line with previous Mississippi decisions, and though it may reach an individually just result, it is against the great weight of authority and is clearly wrong, being contrary to the policy and principles underlying the voidability of infants' contracts. *Wieland v. Kobick*, 110 Ill. 16. In England a claim against an infant like that in the principal case will not support a petition in bankruptcy, because it is not a debt. *Ex parte Jones*, 18 Ch. D. 109. Nor is fraud there a good replication either in law or in equity to a plea of infancy. *Bartlett v. Wells*, 1 B. & S. 836. The doctrine of the principal case has been adopted by statute in Iowa and Kansas. But there is no real need of it, since the infant can be held *ex delicto*. *Rice v. Boyer*, 108 Ind. 472. Allowing this redress is not a violation of the principle that an infant will not be liable in tort where so to hold him would be merely indirectly enforcing his contract, because in such an action the contract is treated as of no effect, and the penalty assessed is not based on the contract, but on the actual loss due to the deceit. *Cf.* 20 HARV. L. REV. 64.

INJUNCTIONS — ACTS RESTRAINED — COLLECTION OF PENALTIES UNDER ALLEGED UNCONSTITUTIONAL STATUTE. — A New York statute limited the price of gas to eighty cents per thousand feet, and fixed a penalty for each overcharge by the gas company. *Held*, that, pending a suit to determine the constitutionality of the statute, the officers charged with the enforcement of the penalty shall be restrained from proceeding, but all charges collected in excess of that fixed shall be impounded to abide the outcome of the suit. *Consolidated Gas Co. v. Mayer*, 146 Fed. Rep. 150 (Circ. Ct., S. D. N. Y.).

Ordinarily equity will not interfere with criminal proceedings. But where irreparable damage would otherwise follow, the majority of the many conflicting cases will be found to hold that equity will restrain the enforcement of penalties under a statute affecting property rights which the court deems unconstitutional. *Smyth v. Ames*, 169 U. S. 466. A few courts, refusing to consider the constitutionality question, decline to enjoin such proceedings. *Boin v. Town of Jennings*, 107 La. 410. The same considerations should apply when temporary relief is asked pending the decision of constitutionality. The fact that there would be irreparable damage in spite of an ultimate decision favorable to the plaintiff should secure an injunction from equity, but on such terms as will work justice in the event of a contrary holding. This involves no presumption as to constitutionality, but is merely an equitable attempt to do justice whatever the final outcome. Equity takes this stand when relief *pendente lite* is sought against an alleged tort, and in other analogous cases of doubtful right. *Denver, etc., R. R. Co. v. United States*, 124 Fed. Rep. 156; *Harriman v. Northern Securities Co.*, 132 Fed. Rep. 464. The decree at hand is accordingly correct on principle, and it is supported by precedent as well. *New Memphis Gas & Light Co. v. City of Memphis*, 72 Fed. Rep. 952.

JUDGMENTS — COLLATERAL ATTACK — FRAUD IN OBTAINING JURISDICTION OF NECESSARY PARTY. — The signature on an acknowledgment of a service of process without the state, in a divorce suit brought by a husband in Texas, was either a forgery or else obtained from the wife by fraudulent representation. A decree of divorce was granted. *Held*, that, in either case, such decree is no defense to a suit afterwards brought by the wife in Alabama, since jurisdiction of the wife was never acquired in the first action. *Ingram v. Ingram*, 42 So. Rep. 24 (Ala.).

If the court rendering a decree has jurisdiction, that decree is not open to collateral attack by the same parties. *Nicholson v. Nicholson*, 113 Ind. 131. If there was no jurisdiction, it is open to such attack in another state; for, under these circumstances, no valid decree could be given. *Parish v. Parish*, 32 Ga. 653; see 19 HARV. L. REV. 384. The simple question, therefore, is, did the acknowledgment of service, assuming it was fraudulently obtained, give the Texas court jurisdiction? It is hard to see why it did not. See *Townsend v. Smith*, 47 Wis. 623, 626. The case is in no wise different, in so far as the acquisition of jurisdiction is concerned, from those cases where a defendant is brought within the limits of a state by fraud or by force, in violation of extradition rights; and it is there held, that, in spite of the method adopted, jurisdiction is nevertheless acquired. *Ex parte Moyer*, 85 Pac. Rep. 897 (Idaho); *Mahon v. Justice*, 127 U. S. 700. The fraud, though it does not prevent jurisdiction, furnishes, in the case of civil suits, a ground for directly impeaching the decree in the state which thus acquired control, or may be a valid defense to any suit seeking directly to enforce the decree in another state. *Dunlap v. Cody*, 31 Ia. 260.

LANDLORD AND TENANT — TERMS FOR YEARS — CONVEYANCE OF STANDING TIMBER. — The plaintiff sold and conveyed by deed to the defendant all the trees on a certain tract of land, provisos being inserted that the grantee should have rights of way, that the timber was to be removed within three years from a fixed date, and that all "timber remaining on the premises should revert and become the property of the plaintiff." After the expiration of the three years the plaintiff brought a warrant of forcible detainer against the defendant, under a statute which declared "the refusal of a tenant to give possession to his landlord after the expiration of his term" to be a forcible entry. *Held*, that the deed created a tenancy, and that therefore the writ is maintainable. *Alexander v. Gardner*, 96 S. W. Rep. 818 (Ky.).

The court in finding a tenancy here seems to have been unduly influenced by the consideration that this grantee could assign his rights and was therefore not a licensee. But a license coupled with an interest is irrevocable and may be assigned. *Heflin v. Bingham*, 56 Ala. 566. For a discussion of the principles involved, see 17 HARV. L. REV. 411.

LEGACIES — ADEMPMENT — CHANGE ACCOMPLISHED BY OPERATION OF LAW. — A testator bequeathed the "interest arising from money invested in the Lambeth Waterworks Co." to his daughter for life. Between the date of his will and the date of his death an Act of Parliament created a Metropolitan Water Board, and vested the undertaking of the Waterworks Co. in it. A block of Metropolitan Water Board stock was issued to the testator as compensation for the stock which at the date of his will he held in the Waterworks Co. *Held*, that the new stock does not pass under the bequest. *Slater v. Slater*, [1906] 2 Ch. 480.

Whether or not a legacy had been adeemed was originally made to depend upon the intention of the testator. It was accordingly held that a change accomplished by operation of law would not extinguish a legacy. *Partridge v. Partridge*, Cas. t. Talb. 226; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258. But the late English cases show clearly that the intention of the testator no longer governs, and that the specific thing bequeathed must still exist. *In re Bridle*, 4 C. P. D. 336. This great change is based on the Wills Act, which provides that descriptions of gifts shall refer, *prima facie*, to property answering that description at the time of the testator's death. See *Goodlad v. Burnett*, 1 Kay & J.

341. The present decision makes it clear that no extrinsic circumstance whatever will be sufficient to show that the testator did not intend the legacy to be adeemed. Probably the American courts would not go to this length. In a state which has adopted the above section of the Wills Act, the supposed intention of a testator was held to require the substitution of a money equivalent for certain stock bequeathed. *Mahoney v. Holt*, 19 R. I. 660.

LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — PHOTOGRAPH OF WRONG PERSON PUBLISHED IN CONNECTION WITH SENSATIONAL ARTICLE. — The defendant corporation published an article under the title "Suicide Fiend," relating various attempts to commit suicide. Under the name of the person described appeared a photograph of the plaintiff. *Held*, that an order overruling the demurrer to the complaint be affirmed. *Wandt v. Hearst's Chicago American*, 109 N. W. Rep. 70 (Wis.).

For a discussion of the principles involved, see 17 HARV. L. REV. 359.

NEGLIGENCE — BURDEN OF PROOF — RES IPSA LOQUITUR BETWEEN MASTER AND SERVANT. — The plaintiff's intestate, a servant of the defendant, was riding in the elevator in his employer's building where he worked. After the elevator had gone a few feet, the bottom of it was torn out, and the plaintiff fell to the basement and was killed. *Held*, that the maxim *res ipsa loquitur* applies. *John Samuels, Adm'r v. John McKesson, Jr.*, 113 N. Y. App. Div. 497. See NOTES, p. 228.

PUBLIC OFFICES — COMPENSATION — RIGHTS WHERE SALARY HAS BEEN PAID DE FACTO OFFICER. — A *de jure* town marshal instituted *quo warranto* proceedings against a *de facto* incumbent and secured an order of ouster, just at the end of the term, and a judgment against the incumbent for the amount of the salary. The judgment proved uncollectible, and action was brought against the town for the salary. *Held*, that on the grounds of public policy and also of estoppel by election of remedies, there can be no recovery. *Samuels v. Town of Harrington*, 86 Pac. Rep. 1071 (Wash.).

For a discussion of the liability of a municipal corporation in such cases, see 7 HARV. L. REV. 54; 15 *ibid.* 675.

RULE AGAINST PERPETUITIES — INTERESTS SUBJECT TO RULE — OPTION TO PURCHASE FEE. — Land was demised for thirty years by the defendants' testatrix, with an agreement that the lessor, her heirs or assigns, would, at any time within the thirty years, convey the fee to the lessees, their successors or assigns, upon payment of a certain sum. The successor of the original lessees chose to exercise this option, but the devisees of the lessor refused to convey. *Held*, that a bill for specific performance will not lie, the option being in violation of the rule against perpetuities, but that damages can be recovered for the breach of contract. *Worthing Corporation v. Heather*, [1906] 2 Ch. 532.

This option was clearly unenforceable in equity. *Woodall v. Clifton*, [1905] 2 Ch. 257; see GRAY, RULE PERP., 2 ed., § 230 b; 18 HARV. L. REV. 379. The court, however, allowed a recovery in damages on the ground that, as the rule against perpetuities only affects property rights, and since at common law no estate would be created in the land, there was no objection to enforcing a legal remedy. Equity, according to the court, refuses to interfere because doing so would create a property right. In short, the reason why the covenant was held valid at law in this case is because it was invalid in equity. This view is certainly odd. Specific performance should be refused on the broader ground that any contract or covenant, which, if enforced, would create an interest in land in violation of the rule against perpetuities, is absolutely void. See 42 SOL. J. 650. Therefore a recovery in damages should be denied. Opposed to the one dictum cited in the case in support of the opinion are numerous authorities, at least one of which maintains that a contract infringing the rule against perpetuities is entirely analogous to a contract against public morals. *Poole's Case*, Moore's Rep. 810; *Jervis v. Bruton*, 2 Vern. 251; see also *Egerton v. Carl Brownlow*, 4 H. L. Cas. 1, 125; GRAY, RESTRAINTS ALIEN., § 77.

RULE AGAINST PERPETUITIES — UNCERTAINTY — POSTPONEMENT OF FUTURE GIFT "AS LONG AS LEGALLY POSSIBLE." — A testator gave the residue of his estate to a trustee "for as long a period as is legally possible," to make annual payments to forty-two annuitants and (with three exceptions) to their heirs, and at the end of that time to divide the trust fund equally among the persons then entitled to the annuities. *Held*, that the gift over is valid and vests twenty-one years after the death of the last surviving annuitant. *Fitchie v. Brown*, Sup. Ct. of Hawaii, November 1, 1906. See NOTES, p. 220.

SALES — ELECTION OF REMEDIES — WRONGFUL DELIVERY BY CARRIER. — The plaintiff shipped goods by the defendant carrier with instructions to notify the purchaser and deliver on presentation of the bill of lading. The defendant wrongfully delivered without requiring the bill, and later the plaintiff received from the purchaser part payment in cash and a check for the balance. The check was dishonored and the defendant was sued for the balance of the purchase money. *Held*, that the plaintiff has waived his right against the defendant by treating directly with the purchaser. *Callaway & Truitt v. Southern R. R. Co.*, 55 S. E. Rep. 22 (Ga.).

It is not disputed that on delivery the defendant became liable for the conversion, and that the plaintiff had then a choice of remedies, — to sue either the carrier or the purchaser. *Furman v. Union Pacific R. R. Co.*, 106 N. Y. 579. There is considerable difference of opinion as to what act is sufficient to show a conclusive election. It is generally held, and it seems correctly, that an unsatisfied demand on the purchaser for payment is not a bar to a subsequent action *ex delicto* against the carrier. *McSwegan v. Penna. Ry. Co.*, 7 N. Y. App. Div. 301. On the other hand the weight of authority holds that the institution of legal proceedings against one party is a waiver of all rights against the other arising from the same facts. See *Robb v. Vos*, 155 U. S. 13, 41. Between these limits the law is unsettled, but the true rule seems to be that, if the plaintiff has done an act which would not be justifiable had he elected to sue the defendant, that act in itself amounts to an election. *Scarff v. Jardine*, 7 App. Cas. 345. And the acceptance of part payment seems to be an act sufficiently decisive to show an intention to waive.

SALVAGE — SUBJECTS OF SALVAGE — LIABILITY OF UNITED STATES FOR DUTIES SAVED. — Goods on which duty had been paid were saved by salvors from loss by fire. The Secretary of the Treasury was authorized to refund the duty paid in case of loss under such circumstances, by U. S. Rev. Stat., §§ 2984, 3689. Under an admiralty rule, "in all suits for salvage the suit may be . . . *in personam* against the party at whose request or for whose benefit the salvage service has been performed." *Held*, that the salvor is entitled to rest his case on the assumption that the Secretary of the Treasury would have refunded the duty in case of loss, and can recover in an action *in personam* for the saving of the duty to the government. *United States v. Cornell Steamboat Co.*, 202 U. S. 184.

Originally only the owners of the property were liable for the salvor's claim. In England such liability has recently been extended to persons interested in the preservation of the property; in one case to a vendor under absolute liability to deliver goods, and in another to charterers responsible for the negligent management of the ship. *The Five Steel Barges*, 15 P. D. 142; see 15 HARV. L. REV. 232. The present case establishes this extension in the United States. The facts here presented push the doctrine to a considerable length, because of the peculiar nature of the government's interest. The court intimates that had the salvor's work been done immediately before the duties were collected, the United States would have been under no liability, which would be drawing the line at the point where the government's interest became direct. The recognized doctrine that salvage is a mixed question of private right and public policy appears fully to justify the decision. See *The Albion*, Lush. 282, 284. The English court has been careful not to commit itself as to how far it would be willing to extend the doctrine. See *The Cargo*

ex Port Victor, [1901] P. D. 243, 257. The question of the liability of insurers, mortgagees, etc., remains still open in both countries.

TELEGRAPH AND TELEPHONE COMPANIES — STATUS OF COMPANIES AS ENGAGED IN PUBLIC EMPLOYMENT — OBLIGATION TO SERVE ALL AT REASONABLE PRICES. — The plaintiffs contracted with the defendant telephone company with the condition that they should connect no foreign telephone attachments to the main instrument installed by the defendant. The defendant having demanded an unreasonable price for such attachments, the plaintiffs in violation of the condition in their contract connected their own. The defendant thereupon stopped the plaintiffs' service, and the latter sought an injunction. *Held*, that providing the plaintiffs disconnect the attachments, the defendant be enjoined from interrupting the service over the main instrument. *Beach v. Chicago Telephone Co.*, 39 Chi. Leg. N. 81 (Ill., Circ. Ct., Cook Co., Oct. 17, 1906).

Though a public service company is bound to serve at reasonable rates all proper applicants, it may like private contractors impose reasonable conditions. *Pugh v. City, etc., Telephone Ass'n*, 9 Wkly. L. Bul. 104 (Oh., Dist. Ct.). The condition imposed by the defendant in the present case was reasonable, and was therefore originally valid. *Gardner v. Providence Telephone Co.*, 23 R. I. 262; *ibid.* 312. But the defendant, having made the installation of attachments a part of its service, should stand ready to provide them at a reasonable price. Inasmuch as it here demanded an unreasonable price, it might properly be said to have waived its right to take advantage of the originally valid condition until it should reduce the price. Thus the stopping of the plaintiff's service was unwarranted. The remedy given here by conditional injunction was defective, in that it did not guard against the probable continued unreasonableness of the defendant's charge for extensions. The court's proper course would have been to impose on the plaintiff the condition of disconnecting his attachment only provided the defendant offered to supply attachments at a reasonable rate. A simpler method, however, would have been for the plaintiff, without attempting self-help, to have applied for a writ of *mandamus*, compelling the defendant to do its common law duty. *State v. Nebraska Telephone Co.*, 17 Neb. 126.

TENANCY IN COMMON — EJECTMENT — DISSEISOR SUED BY ONE TENANT IN COMMON ALONE. — In an action to recover land, it was objected that the plaintiff should have joined others alleged to be tenants in common with him. *Held*, that it is not necessary, since, in an action of ejectment, one tenant in common may recover the entire possession from a stranger. *Godfrey v. Rowland*, [1906] Haw. 577.

The court took the ground that each tenant in common has a right to possession against all but his co-tenants. *Robinson v. Johnson*, 36 Vt. 69. But this position seems unsound in view of the nature of tenancy in common. Since there is no privity of estate, tenants in common could not join at common law, but had to sue separately for an aliquot part. CO. LIT., §§ 292, 311. This has been universally changed either by statute or by judicial legislation, permitting co-tenants to join. *Jackson v. Brandt*, 2 Caines (N. Y.) 175. But if they choose to sue separately, there seems to be no good reason for allowing recovery larger than title. *Dewey v. Brown*, 2 Pick. (Mass.) 387. This results in the better rule that a tenant in common suing alone can recover only his undivided share, and be let into possession in common with the disseisor. *Butrick v. Tilton*, 141 Mass. 93; *Hellyer v. King*, L. R. 6 Exch. 791. The present case allows recovery on the weakness of the defendant's right rather than on the strength of the plaintiff's, and relies on the unwarranted presumption that the other co-tenants desire to oust the occupier. It, also, seems to be opposed to the previous tendency in the same jurisdiction. See *Un Wong v. Kan Chu*, 5 Haw. 225.

TORTS — LIABILITY TO STRANGER FOR NON-PERFORMANCE OF CONTRACT — FAILURE TO SUPPLY WATER IN CASE OF FIRE. — A water company, in consideration of franchises and privileges and of the right to be paid

by the levy of special taxes, contracted with a municipality to furnish water for extinguishing fires. Because of failure to supply the amount contracted for, a citizen's building was destroyed by fire. *Held*, that the company has assumed a public duty, of which the contract is the measure, and for breach of which the company is answerable to this citizen in tort. *Mugge v. Tampa Waterworks Co.*, 42 So. Rep. 81 (Fla.).

For a discussion of the principles involved, see 13 HARV. L. REV. 226. *Cf.* also 19 *ibid.* 467; 15 *ibid.* 767, 784.

TRADE UNIONS—STRIKES—STRIKE AGAINST ONE MAN TO REACH ANOTHER. — Union stone-masons and non-union pointers were competitors for certain work of a special contractor on a building under construction by a general contractor. In order to coerce the former into discharging non-union men, walking delegates, empowered by the rules of their respective unions, caused strikes on other buildings of the general contractor. *Held*, that this is an unlawful conspiracy to interfere with the trade of another, which equity will enjoin. *Picket v. Walsh*, 78 N. E. Rep. 753 (Mass.).

It is now almost everywhere law that outsiders cannot be unwillingly dragged into labor disputes. For a discussion of the principles involved, see 17 HARV. L. REV. 558.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

VESTED AND CONTINGENT REMAINDERS. — In a recent article Professor Albert Martin Kales discusses the distinction between vested and contingent remainders, in the light of a new classification of future interests in land which he advances. *Future Interests in Land*, 22 L. Quar. Rev. 250, 383 (July, October, 1906). The classification suggested is based upon a division of all future interests into three mutually exclusive groups, — the division resulting from the fact that a future interest must come into possession either "by way of succession," as when it succeeds immediately the preceding estate; or "by way of interruption," when it cuts short the preceding estate. The three classes are, then: (a) estates which by the words of the limitation can come into effect only by way of interruption; (b) estates which are so limited that by the words of the limitation they can come into effect only by way of succession; and (c) estates which by the words of the limitation might come into effect either by way of succession or by way of interruption.

As to class (a), estates which are limited so as to come into possession only by way of interruption, such estates are uniformly held bad under the common law with the sole exception of the right of entry for condition broken, and are valid under the Statutes of Uses and Wills. As to class (b), estates intended to take effect only by way of succession, Mr. Kales concludes that all such estates are valid at the common law, even if after terms for years, and even if subject to a condition precedent. All estates in this class are vested remainders, it is said. Lastly, as to class (c), estates limited so that they might conceivably come into possession either by way of succession or by way of interruption, it is argued that such estates are, and alone are, contingent remainders. They are good when they actually can come into effect by way of succession, and fail otherwise. After estates for years they are always invalid at the common law, although probably valid under the Statutes of Uses and Wills.¹

This classification, if correct, offers an excellent rule for distinguishing between vested and contingent remainders, though it must not be forgotten that

¹ Professor Kales notes *Adams v. Savage*, 2 I.d. Raym. 854, as an instance of the conscious reluctance of the judges to give the Statute of Uses its full effect.

it leaves all questions of construction to remain a source of doubt and disagreement. But it is submitted that the classification is illogical and inaccurate. As to the first point, consider the validity of estates in class (*b*) that are subject to a condition precedent (which is sure to be determined before the end of the previous estate) and limited after a term for years. Such an estate is said to be good, but the reasoning to support the acknowledged invalidity of such an estate when the condition may not happen until after the end of the term is equally applicable in this case. The reason given in cases in class (*c*) is that the seisin of the feoffor would be interrupted by the subsequent estate. There must be a similar interruption in class (*b*) unless the seisin be from the beginning in the remainderman, but this cannot be, for *ex hypothesi* he gets no seisin except upon the happening of a condition.

But granting the logic of the author in that instance, it is, however, noteworthy that if the theory be accurate, all contingent remainders can be avoided and exactly the same interest be given as a vested remainder by a mere matter of wording, which is really but declaratory of the existing law. Take, for example, an estate to A for life, remainder to such of his children as attain the age of twenty-one. This is admittedly a contingent remainder. Add the magic words, "at or before the termination of A's estate," and the children will have a vested estate, though they be unborn, since the condition is so worded that it must occur, if at all, before A's estate ends, and so the children's estate can come into possession only by way of succession. Further, it is submitted that the inaccuracy of the position taken by the learned writer is in one instance at least very clearly demonstrable. Suppose an estate to A for twenty years, remainder if B die before the end of A's term to the children of B. B is at present a bachelor. By the suggested rule the limitation to the children of B is supported as a vested remainder. The children of B, then, must have the seisin, — not merely the right in inheritance, but the actual seisin. They are the freeholders.¹ But how could a person not *in esse* be responsible for the many feudal duties of a freeholder? In no case, whether after freehold or not, can a remainder be vested unless there is some one in whom it can be and is vested, *ex vi termini*.²

The fact that this theory allows an estate to be "vested" in a person not *in esse* points to the fundamental error underlying it, — that the author underrates the importance of the idea of seisin, and consequently looks at vesting in possession and at what are conceived to be conditions precedent thereto, rather than at vesting in interest, which alone can be subject to a true condition precedent. Feudal land law, at least so far as it affected the creation of estates, depended entirely upon seisin. Upon a feoffment to one of a freehold with remainders over unconditionally, the remaindermen were conceived of as being owners of shares in the seisin.³ This share in the seisin, "the inheritance," was an actual present right in the land.⁴ The ownership of this interest carried with it inevitably a right to take possession upon the termination of the previous estate.⁵ Such an interest as this is, it is believed, the only vested remainder the law knows. For if the future estate were to commence only upon condition, it would be impossible for the limittee thereof to acquire any interest until the condition happened. It cannot be both that he has the interest now and that his reception thereof is subject to a condition. Since, then, the right to the inheritance cannot immediately pass to the limittee, it must revert to the feoffor⁶ (if there is no subsequent vested remainderman), for the fee must be somewhere. Now let us suppose that the condition happens before the end of the particular estate. Can the inheritance thereupon leap from the feoffor to the would-be

¹ Lit., § 60.

² Fearn, C. R., 9 ed., 9.

³ Leake, Land Law, 45, 46; Van Rensselaer v. Kearney, 11 How. (U. S.) 297, 319.

⁴ See Cook v. Hammond, 4 Mason (U. S. C. C.) 467, 488; Van Rensselaer v. Kearney, *supra*.

⁵ Williams, Real Property, 20 ed., 335.

⁶ Egerton v. Massey, 3 C. B. (N. S.) 338; Gray, Rule Perp., 2 ed., § 113 a.

remainderman? If the condition had not happened until after the end of the particular estate, so that the actual seisin, or possession, had become vested in the feoffor, the common law never did allow it to spring from him. Nor did it originally allow even the inheritance to spring, — contingent remainders were not at first valid.¹ This was logical, for contingent remainders are clearly only executory interests,² and all other common law estates are vested. "A contingent remainder is no estate: it is merely a chance of having one."³ But later, the inheritance, though never the actual present seisin, was allowed to spring upon the happening of the condition from the feoffor to the limittee, who thereupon became a vested remainderman. Even when the condition did not occur until the moment of the ending of the particular estate, it is submitted that the contingent remainder took effect, not as such, but on the theory that it became, though but momentarily, a vested remainder by the springing of the inheritance from the feoffor to the contingent remainderman.

These conclusions necessarily result from the view that when a vested estate is given, it cannot be subjected to any conditions limiting the right to possession that it involves, unless the termination of the previous estate be, inaccurately, deemed such a condition. This is incontrovertible, — otherwise there might be an estate vested in a man, and subject to no other estate, which, however, he might not enjoy, and of which he could not take possession. That is inconceivable. There may, however, be a condition subsequent, the effect of which is, not to prevent the taking of possession under the vested interest, but to divest entirely that interest. Such an estate being possible, it is a question of fact, of construction, whether such an estate be given, or a contingent remainder. If the remainderman is not *in esse*, there is a contingent remainder. If the remainderman is *in esse*, it is convenient to divide, for purposes of construction, all remainders into two classes, — corresponding to classes (b) and (c) of Professor Kales' classification. In class (c), where the condition may not occur till after the end of the particular estate, it is clear that it would generally be contrary to the intent of the testator to allow the estate to be immediately vested, since that might result in giving the remainderman at common law the fee, or at least, under the Statutes of Wills and Uses, possession during a possible interval between the ending of the particular estate and the happening of the condition; whereas it is almost universally the intent of the feoffor to make possession, at any rate, depend upon the prior happening of the condition. Therefore in such cases all conditions are construed as conditions precedent to vesting, and not as divesting clauses, even if subsequent in form. But in cases arising under class (b) of Professor Kales' division where the condition must occur if at all before the ending of the particular estate, the above presumption in favor of a contingent estate has no place, and the remainder is construed either as vested and subject to a condition divesting it, or as contingent, according as the condition is in form subsequent or precedent.⁴

It is submitted that the above result, drawing between vested and contingent remainders the same line that exists between vested estates and any other kind of executory estates, — the result attained by Professor Gray's definition⁵ which Professor Kales criticises, — is more logical than the suggested classification, and more in accord with authority.⁶

FEDERAL JURISDICTION IN SUITS BY INDIVIDUALS AGAINST STATES. — Suits by individuals apparently against states, which afford increasingly fre-

¹ Williams, *Real Property*, 20 ed., 346.

² Washburn, *Real Property*, 6 ed., 526.

³ Williams, *Real Property*, 20 ed., 359. See also *ibid.*, 348, 353, 361, 366; Leake, *Land Law*, 337.

⁴ Gray, *Rule Perp.*, 2 ed., §§ 104, 105, 108.

⁵ Gray, *Rule Perp.*, 2 ed., § 101.

⁶ Cf. Archer's Case, 1 Co. 66 b; Thomas, note to same case, vol. i, p. 165. See Fearne, C. R., *passim*.

quent questions for review by the federal courts, are the occasion for an interesting article in *The Forum*. *Suits against States by Individuals in Federal Courts*, by William Trickett, 11 *The Forum* 25 (November, 1906). An early decision of the Supreme Court¹ allowed *assumpsit* against a state; but the Eleventh Amendment, which quickly followed, denied jurisdiction to federal courts in suits by citizens of one state against another state, and was judicially extended to prevent suits by a citizen against his own state.² Many attempts have been made to avoid the Amendment by suits against state officers, and the principal question now is, — when, though it be not named, is the suit really against the state? To this question the writer has chiefly addressed himself, with the general result of pointing out the more or less serious inconsistencies in the decided cases and the inadequacies of various proposed criteria, rather than of suggesting any sound tests by which the question may be answered.

To coerce an officer may well amount to coercing a state. But it is obvious that the mere plea by an officer when sued in tort for damages, that he acted by order of the state and that it is the real defendant, does not divest the court of jurisdiction, for he is justified only if he had valid legal authority. Moreover, an unconstitutional statute is no authority at all. Consequently, the officer may well be liable in his private capacity and the suit not be one against the state.³ If the officer is sued for the breach of a contract between the state and the plaintiff, it is clearly a suit within the Eleventh Amendment, since only in his official capacity is he a party to the contract. In a suit against state officers to recover property, either real or personal, which they claim to hold for the state, they must show valid authority if the plaintiff is entitled to possession against them as individuals.⁴ A bill against officers to compel specific performance of a contract between the state and the complainant is without the jurisdiction of the court for the same reason that a suit for its breach is bad.⁵ The jurisdiction of the court has most often been questioned in replying to petitions for injunctions to forbid unlawful acts, and especially to prevent the enforcement of an unconstitutional statute. Assuming that it is a proper case for interference if the suit were against an individual, it does not seem beyond the court's jurisdiction because it is against an officer, and injunctions have frequently been granted. The state is not the real party defendant, for it cannot have authorized the threatened acts and so cannot be made to shelter the individual who threatens the wrong under color of his office.⁶ Similarly equity will enjoin the threatened diversion or waste of a special fund in the treasury, or a trust fund held by the state.⁷

Courts have been slow to compel affirmative performance of a legal duty, though not amounting to specific performance. It seems that a suit or petition for *mandamus* is hardly within the Eleventh Amendment, for an officer cannot at once both represent the state and be liable for not acting for it in the same matter. But no court can assume to control his discretion and will issue its *mandamus* only when he refuses to perform an unequivocal official duty involving no exercise of discretion.⁸ But extreme care must be exercised in compelling affirmative action, and one or two decisions seem to have gone rather far toward indirectly compelling the state to perform its obligations.⁹ It is believed that affirmative relief has not been granted when it would imply a

¹ *Chisholm v. Georgia*, 2 Dall. (U. S.) 419. But see the dissenting opinion of Iredell, J., at 429.

² *Hans v. Louisiana*, 134 U. S. 1.

³ *Scott v. Donald*, 165 U. S. 58.

⁴ *Tindal v. Wesley*, 167 U. S. 204 (a suit to recover real property); *Poindexter v. Greenhow*, 114 U. S. 270 (detinue).

⁵ *Hagood v. Southern*, 117 U. S. 52; *Parsons v. Slaughter*, 63 Fed. Rep. 876.

⁶ *Pennoy v. McConaughy*, 140 U. S. 1.

⁷ *Chaffraix v. Board*, 11 Fed. Rep. 638 (a special fund); *Preston v. Walsh*, 10 Fed. Rep. 315 (a trust fund).

⁸ *Board v. McComb*, 92 U. S. 531.

⁹ *Cf. Seibert v. Lewis*, 122 U. S. 284.

dealing with the property of the state. Because of its proprietary interest, the state may necessarily be involved.¹ Where the state itself is plaintiff, the court may allow a cross-bill or set-off to be maintained against it.² This is not a real exception to the rule, for the state has submitted voluntarily to the jurisdiction of the court as an ordinary suitor. But no judgment, even for costs, can be rendered against the state.³

THE LIMITATION OF GROUNDS FOR REVERSAL FOR ERROR. — A serious fault in the administration of American law is the frequency with which our appellate courts order new trials. To the literature on this topic Judge Charles F. Amidon has recently added an admirable essay. *The Quest for Error and the Doing of Justice*, 40 Am. L. Rev. 681 (September-October, 1906). Judge Amidon points out that there has been no improvement since 1887, when new trials were granted in forty-six per cent of the cases appealed in the United States, while in England from 1890 to 1900 the percentage was under four. The defect in administration here, it is said, is that where error is found, prejudice is presumed and the judgment reversed, thus requiring of the trial court infallibility rather than justice. Nothing should be presumed, since the court can see the facts by examining the record; but the temporary greater ease and speed offered by this summary method procured its adoption. The effect on the trial judge has been to divert much of his attention from the question at issue to a multitude of small points, and on the lawyer to put him on a constant hunt for error, equally as important as securing the verdict. The remedy offered by the writer is that no new trial should be granted unless the court, after examining the whole record, finds there has been a miscarriage of justice. This plan has been adopted in England. The verdict, which we have made an end, would be restored to its proper function of being a means of doing justice, without infringing the right of having controverted questions of fact passed upon by a jury. And finally, the writer declares, because of our failure to adopt some such remedy, the machinery of our criminal law is breaking down.

But it is not an accurate statement that on appeal infallibility is required on the part of the trial courts. To be sure, when error exists in the record, one line of cases declares that prejudice is to be presumed unless the contrary is proved, but another maintains that it is not to be presumed unless proved. It would be useless as well as impractical to decide which has the greater support in view of the multitude of cases in point.⁴ The doctrine is also well established here that there can be no reversal in favor of a party against whom the court would be justified in directing a verdict.⁵ In several states statutes forbid reversal for error not affecting the merits of the action.⁶ But Judge Amidon goes further in urging reversal only for prejudice amounting to injustice, and in a few cases our courts have gone thus far.

The old common law principle was not to reverse unless the real truths of the case had not been disclosed.⁷ The spirit of the present practice is contentious, offering to the litigants a fair fight with the judge as umpire. But this is really discrimination in favor of the richer litigant. Its result has been to increase our courts' burdens. The common law principle was a trial by the court assisted by the jury, while we have now evolved a trial by the jury with the aid of the

¹ See *Christian v. Atlantic, etc., Ry. Co.*, 133 U. S. 233.

² *Port Royal Ry. Co. v. South Carolina*, 60 Fed. Rep. 552.

³ See *Reeside v. Walker*, 11 How. (U. S.) 272; *New York v. Dennison*, 84 N. Y. 272.

⁴ See, e. g., 2 Encyc. of Plead. and Prac. 532; 3 Cyc. 386.

⁵ See 3 Cyc. 385.

⁶ See Mo. Rev. Stat. 1899, § 865.

⁷ See *New Trials for Erroneous Rulings*, by Professor J. H. Wigmore, 3 Colum. L. Rev. 433.

court.¹ Our courts are constantly ordering and setting aside verdicts, thus weighing all the evidence and deciding what its effect should be. The principles which permit such procedure would justify the courts in weighing a piece of excluded evidence and determining its effect on reasonable men. In a late series of articles by prominent lawyers in one of the magazines,² Judge Amidon's statistics have been discussed, and his statement of the inefficiency of our criminal law machinery has in general been approved. On the whole there can be little doubt of the expediency of a change along the line he suggests, so far as our constitutions permit.

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- ADMISSIBILITY OF DECLARATIONS OF THE INSURED AGAINST THE BENEFICIARY. *Albert Martin Kales*. Declarations of the insured made after the date of the policy should not be admitted against the beneficiary, though the latter's interest is, by the terms of the policy, revocable. 6 Colum. L. Rev. 509.
- AMENABILITY OF MILITARY PERSONS TO THE LAWS OF THE LAND. *Charles E. Smoyer*. Concisely summarizing their accountability to the concurrent jurisdictions of federal, state, and military courts. 5 Mich. L. Rev. 12.
- BASIS OF CASE-LAW. II. *A. H. F. Lefroy*. Public Policy and other practical considerations as primary sources of case-law. 22 L. Quar. Rev. 416.
- CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, THE. *Roscoe Pound*. 40 Am. L. Rev. 729; 14 Am. Lawyer 445.
- CONCERNING THE CONSTITUTIONALITY OF THE LAW REGULATING INTERSTATE RAILWAY RATES. *D. Walter Brown*. A brief argument in favor of its constitutionality. 6 Colum. L. Rev. 497. See 19 HARV. L. REV. 487; 20 *ibid.* 127.
- CONSENSUS IN DOCTRINE BY THE STATES OPPOSED BY FEDERAL DECISION. *Anon.* A brief consideration of the question when the federal courts should follow the decisions of the state courts. 3 The Law 134.
- CONSIDERATION OF THE UNIFORM NEGOTIABLE INSTRUMENTS LAW, A. *John D. Milliken*. Discussing the origin, history, and criticism of the law. 14 Am. Lawyer 346.
- CONSTITUTIONAL LIMITATIONS ON THE REGULATION OF CORPORATIONS. *Frederic R. Coudert*. Discussing the different application of constitutional provisions to individuals and to corporations. 6 Colum. L. Rev. 485.
- DOCTRINE OF HADDOCK *v.* HADDOCK, THE. *Henry Schofield*. Supporting the result of the case, and arguing that a state should not be allowed to consider a divorce case at all unless it has personal jurisdiction of the parties. 1 Ill. L. Rev. 219. See 19 HARV. L. REV. 586.
- EQUALITY IN RATES BY PUBLIC SERVICE CORPORATIONS. *Anon.* Maintaining that the law requiring equal rates from carriers should be extended to all public service corporations. 3 The Law 262.
- FUTURE INTERESTS IN LAND. II. *Albert Martin Kales*. 22 L. Quar. Rev. 383. See *supra*.
- GROWTH, AGGRESSIVENESS, AND PERMANENT CHARACTER OF ANGLO-SAXON LAWS AND INSTITUTIONS, THE. *Albert W. Gaines*. A historical sketch. 40 Am. L. Rev. 694.
- HARTER ACT AND BILLS OF LADING LEGISLATION, THE. *F. Sieveking*. Reviewing European agitation favoring legislation invalidating clauses in bills of lading which relieve ship owners from liability for loss caused by the masters or crew, and opposing such legislation at present. 16 Yale L. J. 25.
- HAS THE FEDERAL GOVERNMENT A POLICE POWER? *Anon.* Contending that it has such power in certain cases, sufficient to justify on constitutional grounds pure food legislation. 32 Nat. Corp. Rep. 849.
- HOW FAR WILL THE SUPREME COURT GO IN REVIEWING THE ACTION OF THE INTERSTATE COMMERCE COMMISSION UNDER THE NEW RATE LAW? *Anon.* Submitting that the courts will investigate questions of fact only to determine whether the rate fixed is confiscatory. 32 Nat. Corp. Rep. 877.

¹ See The Administration of the Jury System, by Judge H. B. Brown, 17 Green Bag 623, 624.

² See The Outlook for Sept. 8, 1906, *et seq.*

- IS THE ACT OF CONGRESS OF JUNE 11, 1906, KNOWN AS THE "EMPLOYER'S LIABILITY ACT," UNCONSTITUTIONAL? *J. J. McSwain*. Contending that the Act is not unconstitutional *in toto* because the language is so broad as to include a class of cases over which Congress has no power to legislate. 63 Cent. L. J. 356.
- LARCENY FOR DIRECTORS TO CONTRIBUTE TO A POLITICAL CAMPAIGN FUND. *Anon.* Briefly commenting on and agreeing with a recently reversed New York decision which held such action to be larceny. 3 The Law 133. See 19 HARV. L. REV. 611.
- LAWYERS AND CORPORATE CAPITALIZATION. *Edward M. Shepard*. Advocating the repeal of statutes which require corporations to file their specific capitalization and par value of stock at the time of incorporation, as a relief to the evils of fictitious values and consequent loss of public confidence. 18 Green Bag 601.
- LEGAL ASPECTS OF OUR INTERVENTION IN CUBA. *Edwin Maxey*. Suggesting solutions to several novel questions which may arise under the provisional government of the United States in Cuba. 14 L. Stud. Helper 301.
- LIABILITY OF SURETY FOR PAYMENT OF RENT. *Anon.* Supporting *Stacey v. Hill*, which decided that a surety is not liable on disclaimer by a trustee in bankruptcy of the lessee. 25 L. N. (London) 339.
- LIBEL BY PRAISE. *Anon.* A consideration of a recent Louisiana case commonly said to involve this doctrine. 23 Chi. L. J. 231. See 19 HARV. L. REV. 527.
- PERJURY BY PRISONERS IN THE WITNESS-BOX. *Anon.* Maintaining that convictions for such false swearing are proper, not being double jeopardy or a retrial of *res judicatae*. 70 J. P. 469.
- QUEST FOR ERROR AND THE DOING OF JUSTICE, THE. *Charles F. Amidon*. 40 Am. L. Rev. 681. See *supra*.
- SERVICE OF SUMMONS—ELEMENTS OF ACT—DUTY OF PERSON SERVING ON REFUSAL TO ACCEPT PROCESS. *Anon.* A statement of the New York rules of procedure not found in the civil code. 7 Bench and Bar 25.
- SPLITTING UP CAUSES OF ACTION ON CONTRACT. *Raymond D. Thurber*. Covering the New York law on the subject, and reconciling so far as possible the decisions in various classes of cases. 7 Bench and Bar 13.
- SUITS AGAINST STATES BY INDIVIDUALS IN FEDERAL COURTS. *William Trickett*. 11 The Forum 25. See *supra*.
- TORRENS SYSTEM, THE. *Howell Griswold, Jr.* Advocating a system for recording titles by which the investigation would be done by court officers and the title guaranteed by the state. 13 The Bar 16.
- UNCONTRADICTED TESTIMONY OF INTERESTED WITNESSES. *C. C. M.* Showing the bearing of the New York cases upon the question, and protesting against the separate classification of interested witnesses as to credibility. 10 L. N. (Northport) 147.
- VICE-PRINCIPAL DOCTRINE IN ILLINOIS, THE. *George Haven Miller*. With exhaustive Illinois citations. 1 Ill. L. Rev. 242.
- WHAT IS EQUAL PROTECTION OF LAWS AS APPLIED TO TAX LAWS? *C. R. Skinner*. Arguing that it is not necessary that law should apply to all property in all parts of a political subdivision. 63 Cent. L. J. 318.
- YEAR BOOKS, THE. II. *W. S. Holdsworth*. Their emphasis of the law of real property and pleading. 22 L. Quar. Rev. 360.

II. BOOK REVIEWS.

THE VICTORIAN CHANCELLORS. By J. B. Atlay. In two volumes, with portraits. Volume I. Boston: Little, Brown & Company. 1906. pp. xi, 466. 8vo.

Mr. Atlay's book will appeal to many readers. It will appeal to the student of history and political science, for those who have sat upon the Woolsack have left their impress on legislation and upon the development of constitutional government in England; it will appeal to the lover of biography, because it is an excellent example of that branch of literature, and deals with the careers of interesting and noted men; and it will appeal to lawyers, American as well as English, for they will be glad to read the lives of the men whose labors and decisions have done much to mold the development of equity.

It is difficult, if not impossible, to point out in any other country an office whose holder exercises so many separate functions as does the Lord Chancellor

of England. The office is unique. Its holder is a direct participant in the legislative, the executive, and the judicial functions of the government. He is the presiding officer of the House of Lords, and takes part in legislation; he is an important member of the Cabinet, and takes part in administration; he is at the head of the administration of equity, and he is first among the Law Lords in the highest branch of the Supreme Court of Judicature, — the House of Lords sitting as a court. To fill the office a man must be something more than a mere legislator, than an administrator, than a great lawyer or a good judge. To fill it as it should be filled, he must combine the essential qualities of all. This should be borne in mind as one reads Mr. Atlay's book.

In volume one the author writes of the lives of but three of the Victorian chancellors, — Lyndhurst, Cottenham, and Truro. He includes in the volume Lord Brougham, who was not a Victorian Chancellor, but whose career was so closely allied with the fortunes of his immediate successors that it was necessary for completeness. The lives of Lyndhurst and of Brougham occupy more than four-fifths of the volume; only eighty pages are devoted to Cottenham and to Truro together. We might be disposed to find fault with the disproportion if we did not bear in mind the threefold nature of the Chancellor's office, and the type of man necessary to fill it. Lyndhurst and Brougham were leaders in Parliament, and leaders of their parties in the stirring days of Catholic Emancipation, and the First Reform of Parliament. Cottenham and Truro were of a later time, and were far less prominent in party councils.

In the life of Brougham is an interesting, careful, and apparently unbiased story of the famous trial of Queen Caroline in which Brougham did his most noted service as an advocate, and in which were opposed to him, among others, his friend Sir John Singleton Copley, afterwards Lord Lyndhurst, and the famous James Parke, afterwards Lord Wensleydale.

The book shows painstaking and careful investigation, and throughout the quotations from original sources are useful and apt. The author has handled his material judicially, and has avoided the position either of an enthusiastic partisan in the one case or unreasoning detractor in the other. The lawyer will perhaps be a little disappointed that Mr. Atlay has not given more space and consideration to an estimate of the legal ability and services of the chancellors; but no question can be made that he has shown with great clearness their position as great public servants in the world of affairs. The book is very readable.

S. H. E. F.

THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XXI. For the year 1906. BOROUGH CUSTOMS. Volume II. Edited for the Selden Society by Mary Bateson. London: Bernard Quaritch. 1906. pp. clix, 224. 4to.

This volume deserves much praise for the value of the material which the editor has collected and for the high standard of scholarship which she has displayed in editing her texts. The work as a whole ranks among the best publications of the Selden Society, and is the most valuable contribution to our knowledge of English municipal history produced in recent times. An elaborate introduction explains "how the borough customs differed from the law of the land, why they differed, and in what way they were brought ultimately into such harmony that borough custom has ceased to be a matter of much practical interest." The editor calls attention to the fact that the boroughs long retained many interesting archaic practices derived from Anglo-Saxon and Danish folk-law. She also shows that the borough customs contributed something to the making of the common law.

We have little to offer in the way of criticism. Perhaps the editor is inclined to see "suggestions of high antiquity" in too many borough customs. It is misleading to couple "lot," or right to share in bargains, with "scot," or duty of payment to common charges (p. xlix). An earlier reference to the term of forty weeks in the action of "fresh force" at Oxford than the one mentioned on page cxx will be found in Year Book, 15 Edward III. 478, edited by L. O. Pike.

C. G.

ROMAN WATER LAW. Translated from the Pandects of Justinian by Eugene F. Ware. St. Paul: West Publishing Company. 1905. pp. 160. 8vo.

This is an interesting monograph on the subject of the Roman law concerning fresh water. It is composed of excerpts from the *Corpus Juris Civilis* (particularly the Digest), which bear in any way upon this subject. Primarily it is a literal translation of these excerpts. This material from the Roman law has been arranged by the author in the following topics: Rivers, Rain Water, Springs, Drip, Waterworks, Sewers, Reservoirs, Irrigation, Water-Rights, Right of Way, and the appropriate remedies and procedure of the civil law as to them. It is an advantageous contribution to the literature on Roman law.

It is supplemented by the Spanish law on the same subject as found in the *Siete Partidas*, which was the law of Spain when America was discovered, and which underlies the modern Mexican law upon this subject. Students of legal history in Louisiana and certain of the southwestern states should welcome this addition of the author to the proper scope of his work.

The author's introduction of fifteen pages is an ambitious effort. It notices the point of contact between certain American states and the civil law, discusses the codification of the Roman law by the Emperor Justinian, and gives some interesting data as to the possible influence of Assyrian, Persian, and Egyptian law on Roman water law. Furthermore, it contains what is found in the works of the French civilian, Domat, and in the French Civil Code, relative to the same subject, — a feature which would have come more logically in the supplemental posterior portion of the book.

C. P. S.

FOIBLES OF THE BENCH. By Henry S. Wilcox. Chicago: Legal Literature Company. pp. 144. 8vo.

There is small attraction to be found in this book, which is filled with chapters devoted to the delinquencies of our judiciary. The choice of the means used to point out these defects is not happy, and perhaps has resulted in the loss of what might have been an amusing satire. But attempts at wit, bitter and venomous, are not productive of any of the results the author could wish, nor does the ridicule of personal features of the fictitious judges held up for judgment aid in scoring the point he desires. The absence of personalities in the latter chapters leaves a pleasanter taste, and especially makes the general remarks on judicial needs more convincing, but where the needs are admittedly the greatest the author's lack of power of expression is the most noticeable. The press work is not a recommendation for the book.

M. F.

AN UNABRIDGED TABLE OF CITATIONS OF CASES IN THE WISCONSIN REPORTS. Compiled by B. K. Miller. Privately Printed. pp. 804. 8vo.

In this work all citations of Wisconsin cases (up to and including the 126th volume of Wisconsin reports) have been culled from the American and English official reports, including most of the *nisi prius* reports. It also includes many citations from leading periodicals, and references to cases which, though they do not cite Wisconsin cases, are similar in principle. All who deal with Wisconsin law will find this book of great value. It gives the means of ascertaining the standing of any particular case, and points the way to fresh authority. It is to be hoped that a similar work will be brought out in other states.

THE REMINISCENCES OF SIR HENRY HAWKINS, BARON BRAMPTON. Edited by Richard Harris. London: Edward Arnold. 1905. pp. xi, 358. 8vo.

This volume is a welcome relaxation from more serious legal contemplations, and makes a most cheering companion to the blazing logs of a winter's fire. We are soon friends with the author, and as we laugh at his predicaments and his escapes from them and enjoy his anecdotes, we see England, its life and

its manners, in the early part of the last century. Nor do we grow weary, for the Baron's experiences throughout his career seem to have been as many and as diversified as his progress at the bar was successful. With many well-known trials do we become more familiar, and the author can well be pardoned evidence of occasional self-satisfaction in the happy issue to which he almost always brought them. But the accounts of examinations and cross-examinations are not limited to his own; the brilliance of contemporaries is shown. The history of the Tichborne case and the part Sir Henry took in the *dénouement* of that astounding deception are especially interesting.

M. F.

A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS. By Howard S. Abbott. Vol. III. St. Paul: Keefe-Davidson Company. 1906. pp. xvi, 1981-3045. 8vo.

NEW ENGLAND TOWN LAW: a Digest of Statutes and Decisions concerning Towns and Town Officers. By James S. Garland. Boston: The Boston Book Company. 1906. pp. xxxi, 900. 8vo.

FOIBLES OF THE BENCH. By Henry S. Wilcox. Chicago: Legal Literature Company. 1906. pp. 144. 8vo.

STUDIES IN AMERICAN JURISPRUDENCE. By Theodore F. C. Demarest. New York: The Banks Law Publishing Company. 1906. pp. xviii, 359. 8vo.

FEDERAL RATE BILL, IMMUNITY ACT, AND NEGLIGENCE LAW, of 1906. Annotated by F. N. Judson. Chicago: T. H. Flood & Company. 1906. pp. 40. 8vo.

HARVARD LAW REVIEW.

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NO. 4.

CRUCIAL ISSUES IN LABOR LITIGATION.

Dedicated to Professor Langdell.

I.

"We have said here more than once that these points will never be cleared up till we leave off talking about conspiracy and malice." — 20 Law Quarterly Review 3.

WHEN, if at all, does the law impose liability for preventing the formation, or causing the termination, of business relations, in cases where no breach of contract is involved, and where the methods used do not include defamation, fraud, or force, or reasonable apprehension of force? What constitutes actionable interference with the right to form or maintain business relations?

(1) A attempts to enter into a contract relation with C. B induces C not to form such a relation with A ; but does not use defamation, fraud, or force, or threat of force as a method of inducement.

(2) A and C sustain to each other a contract relation terminable at the will of either party. B induces C to terminate the existing relation. *Ex hypothesi* there is no breach of contract on the part of C. Defamation, fraud, or force, or threat of force is not among the methods of inducement used by B.

When, if at all, has A an action against B?¹

It is proposed to consider some of the points which arise under the above general question, giving especial attention to certain topics arising in so-called "labor litigation." The purpose is to

¹ It is assumed, for the present, that the right or interest of A in (2) is not entitled to any higher degree of legal protection than his interest in (1). But this has been doubted, and the question is not yet settled by authority. See 37 Am. L. Reg. (N. S.) 374; North, J., in *Allen v. Flood*, [1898] A. C. 1, 43, 44.

discuss the question on principle rather than to present a collection and analysis of authorities.¹ But it should be said that the number of decisions necessarily inconsistent with some of our conclusions is much smaller than might be supposed upon a superficial examination of the cases. If we look "to what has been actually *decided*" in many cases rather than "to what has been *said*," it will be found that the present reasoning would not necessarily have led to a different result. For some decisions "better reasons may now be given than were thought of when the decisions were announced."

The primary question is as to the liability of a single man acting independently (*i. e.*, not in concert with others). After this has been settled, and not till then, comes in legal order the question whether members of a combination incur greater liability than a single man. Unfortunately, however, the discussion of the first question has been overshadowed by the discussion of the second. Defendants have, in many cases, been members of a combination, and there has been a tendency to hold them principally on that ground; the court ignoring the question whether a single man accomplishing the same result with the same purpose would have been liable, or perhaps tacitly assuming his non-liability. But in many of these cases it was unnecessary to rest the decision on the element of combination. The damage in question would have been tortious if done by a single individual acting independently.² Of course an ordinary individual, in many instances, could not succeed in accomplishing the same damage which has been caused

¹ For a critical examination of authorities bearing on various phases of the general question, see the following articles in legal periodicals: Prof. Lewis, 42 *Am. L. Reg. (N. S.)* 125; 18 *HARV. L. REV.* 444; Prof. Huffcut, 37 *Am. L. Reg. (N. S.)* 273; 18 *HARV. L. REV.* 423; Prof. Ames, 18 *HARV. L. REV.* 411; Prof. Wyman, 17 *Green Bag* 21 and 210; 15 *Green Bag* 208.

² "But I should be sorry to leave this case without observing that, in my opinion, it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of." *Romer, L. J.*, in *Giblan v. National, etc., Union*, [1903] 2 *K. B.* 600, 619.

"The judges may consider, with a care not yet given to the subject, what acts may be crimes when done by an individual acting alone with a view to interfere with the liberty of his neighbor; . . . May not much conduct even now, which is masked under the euphemism of peaceful picketing, be criminal though pursued only by a single individual?" Prof. A. V. Dicey, *National Review*, October, 1906, p. 220.

See also Prof. Dicey, in 18 *L. Quar. Rev.* 4; Lord Lindley, in *Quinn v. Leatham*, [1901] *A. C.* 495, 537; Fitzgibbon, *L. J.*, in *Sweeney v. Coote, Ireland* [1906] 1 *Ch.* 51, 109, 110.

by the acts of a combination. But there is no inherent impossibility as to the accomplishment of such damage by a single powerful individual. There have been, and are, instances of single persons having power to accomplish, and sometimes actually accomplishing, damage such as is usually caused by such combinations. One of the questions now looming up is, not whether a combination incurs greater liability than an individual, but whether a combination enjoys greater immunity than an individual (a point to be considered later under the head of justification).

"Half the controversies in the world," said Cardinal Newman, "are verbal ones, and, could they be brought to a plain issue, they would be brought to a prompt termination. Parties engaged in them would then perceive, either that in substance they agreed together, or that their difference was one of first principles. . . . When men understand what each other mean, they see, for the most part, that controversy is either superfluous or hopeless."¹

We will not affirm that all difficult questions in labor litigation would be instantly solved if words were used with exactness and in only one signification; but it is safe to say that the difficulties of solution would thus be materially diminished. Certainly it is impossible to have any clear discussion of the present subject, unless we either discard certain ambiguous expressions altogether or distinctly indicate the meaning intended to be affixed to them.²

The confusion engendered by the use of the word "malice" has been so often remarked upon by the highest authorities that it cannot now be necessary to enlarge upon it, nor to discuss the difference between the popular sense and the legal sense, between "express malice" and "implied malice," between "malice in fact" and "malice in law." It is not the least of the merits of the Indian Penal Code that the use of this word is entirely avoided. In his recent opinion in *South Wales Miners' Federation v.*

¹ Newman, *Oxford University Sermons*, 1890 ed., 200, 201.

² The word "strike" is used to describe various kinds of conduct quite distinct from each other. The same is true of the word "boycott."

As to the various meanings of "strike," *cf.* Report of Royal Commission on Trade Disputes, etc., p. 16, art. 66 (3); Dissenting Report of Sir W. T. Lewis, pp. 120, 121; Hammond, J., in *Plant v. Woods*, 176 Mass. 492, 496, 497.

As to the various meanings of "boycott," *cf.* Adams and Sumner, *Labor Problems*, 197, enumerating "four distinct varieties of boycott," and Mitchell, *Organized Labor*, 289, 290, as to the distinction between "a direct boycott" and "a secondary boycott."

Glamorgan Coal Co., Lord Lindley said: "... it conduces to clearness in discussing such cases as these to drop the word 'malice' altogether and to substitute for it the meaning which is really intended to be conveyed by it."¹

The words "intent" and "motive" cannot be entirely banished from legal discussions; but the user should always indicate the sense in which he employs them, except where this is unmistakably inferable from the context.² At present, "intent" and "motive" are often used interchangeably, as though they were exact equivalents of each other.³

The word "intent" is used in at least three distinct senses; to express sometimes one and sometimes another of three things which are really distinct from each other.

1. Intent is used to denote the volition, the exercise of will power, requisite to constitute a muscular movement an act; *i. e.*, to constitute the movement of a man's muscles the act of that man. If the motion of a man's arm is due to spasmodic contraction of the muscles while he is undergoing an epileptic fit, then that motion of the arm is not his act. But a similar motion of the arm due to an exertion of his will power, due to a voluntary contraction of the muscles, is his act.

This signification of intent does not specially concern the present discussion.

2. Intent is used to denote the immediate object, or consequence, or effect, aimed at by the doer of an act; the immediate result desired by the actor.⁴

3. Intent is used, not to signify the object or result immediately aimed at, but to denote the reason for aiming at that object; not to indicate the

¹ [1905] A. C. 239, 255. Cf. Prof. Ames, 18 HARV. L. REV. 422.

² The word "intent" or "intend," as used in the charge and special findings in *Leatham v. Craig*, received conflicting interpretations at the hands of the judges *in banco*. Ireland [1899] 2 Q. B. & Ex. D. 667, 744. Cf. O'Brien, C. J., pp. 724, 725, 726, 731; Lord Ashbourne, p. 752; Walker, L. J., p. 768; Palles, C. B., p. 713.

³ "Nothing is more frequent in jurisprudence than the confusion of motive with intention." 1 Austin, Jurisp., 3 ed., 355.

"During the arguments that have been addressed to your Lordships, I do not think that quite sufficient distinction was drawn between the intention and the motives of the defendants. Their intention clearly was that the workmen should break their contracts. Their motives, no doubt, were that by so doing wages should be raised." Lord James of Hereford, in *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239, 252.

⁴ It will be noticed that intent is here used in Markby's sense of "desire," and not in Austin's sense of "expectation." Cf. Markby, *Elements of Law*, 3 ed., §§ 217, 220, 222, and 1 Austin, Jurisp., 3 ed., 433.

result immediately desired, but the cause for entertaining that desire, the feeling which makes the actor desire to attain that result.

To illustrate the distinction between 2 and 3, take the following case:

A republican kills the king. He is actuated, not by ill will to the monarch, but by a patriotic desire to promote the welfare of the country. Being indicted for intentionally killing the king, he says that his intention was not to kill the king but to benefit the country.

Of course this defense would not avail. It confounds intent and motive (or, if we use the word "intent" in both cases, it confounds immediate intent with ulterior or ultimate intent). "But the nature of the consequences" immediately "intended, and the nature of the motive which gave birth to the intention, are objects which, though intimately connected, are perfectly distinguishable."¹ ". . . and the causes of intention are called motives."² "The intention is the aim of the act, of which the motive is the spring."³ Intention "is the result of deliberation upon motives, and is the object aimed at by the action caused or accompanied by the act of volition."⁴ It is illogical to "argue that a man did not entertain a given intention because he had a motive for entertaining it."⁵

Take another case, where there is not a single act, but a series or succession of acts, all prompted by one and the same ultimate motive:

It is impossible to kill the king without first killing the sentinel at the palace door. A republican, in order to carry out his purpose of killing the king, kills the sentinel; and then, having thus gained admission, kills the king. He is friendly towards the sentinel and has no personal ill will towards the king. His reason for desiring the death of the king is his belief that the monarch's death will promote the welfare of the country. Being indicted for intentionally killing the sentinel, he says that his governing intention was not to kill the sentinel but to kill the king.

This defense, again, cannot be maintained. When he says that he did not desire the death of the sentinel, he means only that

¹ Bentham, *Principles of Morals and Legislation*, c. IX, ¶ XIII.

² *Ibid.*, c. VIII, ¶ XIII, and c. XI, ¶ XXVIII.

³ 1 Austin, *Jurisp.*, 3 Eng. ed., 165.

⁴ 2 Stephen, *Hist. of Crim. Law of Eng.*, 110.

⁵ *Ibid.*, 111-112.

he did not desire that result for its own sake. But he certainly did desire it as a means to the end of attaining his ultimate object. "The ulterior intention of one wrongful act may be the commission of another";¹ but that does not necessitate the conclusion that there was no immediate intent in doing the first act, that there was no immediate consequence aimed at in the doing of the first act. It cannot be maintained "that the presence of an ulterior intention takes away the primary immediate intention."²

Compare also the following instances in labor litigation where intent and motive are confounded:

(a) Defendant denies intent to harm plaintiff, when he really means only to deny a bad motive for the intent. Defendant means that he did not do harm to the plaintiff "for the sake of the harm as an end in itself," but "merely as a means to some further end legitimately desired."³

(b) Defendant justifies on the ground of self-interest. Plaintiff attempts to rebut by alleging bad motive, and seeks to sustain allegation by proof simply of intent to harm. In many of these cases the defendant's motive or ultimate intent is in itself a perfectly good one; namely, a desire to promote his own welfare or that of his union.⁴

It must now be apparent that the ideas described in 2 and 3, *ante*, p. 256, differ from each other; and that infinite confusion must ensue if the same word or phrase is used to denote both.⁵

¹ Salmond, *Jurisp.*, 418. "A person may pursue an immediate end merely as a means to a more remote one, and that in turn as a means to one still further on; and thus any given act or omission may be regarded as directed to the attainment of a series of ends of different degrees of remoteness." Terry, *Leading Principles of Anglo-American Law*, § 192.

² 2 Stephen, *Hist. of the Crim. Law of Eng.*, 112.

As to cases where either the immediate intent or the motive is "complex instead of simple," where the act is done with the intent of simultaneously bringing about two immediate results, or where the doer is actuated by two concurrent motives, see 1 Bishop, *New Crim. Law*, §§ 339, 340, and Salmond, *Jurisp.*, 418, 419.

³ "True, the defendants contend and testify that their purpose was to benefit their own members. This, doubtless, in a sense, is true, but the benefits sought were the remote purpose which was to be secured through the more immediate purpose of coercing the plaintiffs into complying with their demands or otherwise injuring them in their business, and the court cannot, in this proceeding, look beyond the immediate injury to the remote results." *Purvis v. Local, etc.*, 214 Pa. St. 348, 359.

⁴ Whether a really bad motive (such as personal ill will to the plaintiff) would destroy an otherwise sufficient justification, is a question to be considered later. The point to be noticed now is that in many labor disputes this question does not arise, inasmuch as the motive, or ultimate intent, is not bad. See Mr. Justice Holmes, 8 HARV. L. REV. 8; and Prof. Ames, 18 HARV. L. REV. 418, n. 3.

⁵ For an example of using "motive" to cover both ideas, reference may be made to the question recently suggested "concerning a soldier, who, after taking aim, fired

Different words or phrases must be used for each. What these words or phrases shall be is not a matter of supreme importance, although a general agreement of lawyers as to phraseology might save much time which would otherwise be devoted to explanation of the meaning of terms. For ourselves we propose to use the word "intent" to denote the ideas expressed in 2, and "motive" to denote the ideas expressed in 3. If one prefers, he may use "immediate intent" as to 2, and "ulterior intent" or "ultimate intent" as to 3;¹ or new words or new combinations of words may be invented.² But whatever expressions are employed, their meaning should be clearly stated, and their use should be consistent throughout the discussion.³

Taking the terms "intent" and "motive" in the significations we have given them, intent is frequently material upon the question of the actor's liability in tort, whereas the cases where motive is material are comparatively rare. Bad motive is not generally a requisite element in making out a *prima facie* case. Good motive does not, alone and of itself, constitute a justification for the intentional infliction of harm.

Recurring now to the direct consideration of the question stated at the beginning of this article, the first inquiry is as to the nature of the plaintiff's interest or right which he claims has been infringed.

In some quarters it almost seems to be assumed that an interest or right must be absolute, or else it cannot exist at all. If the right is not fully protected, it is treated as practically non-existent. *E converso*, if it is admitted to exist at all, then it is assumed that it must necessarily be fully protected. But the analogies of the

off his rifle in time of battle, whether his predominant motive was to help his country or hurt his enemy." Here we should say his intent was to hurt his enemy, his motive was to help his country.

¹ See Mercier, Criminal Responsibility, 45.

² Prof. Dicey uses the word "object" instead of "intent." In 18 L. Quar. Rev. 2, he says: "This distinction between motive and object may be called a fine one, but it is a real distinction and corresponds with the dictates of common sense." To this the editor, Sir Frederick Pollock, adds: "Moreover it is at least as old as Aristotle's Ethics." But see Chalmers-Hunt, Trade Unions, IV, V.

³ "Nobody is at liberty to censure men or communities of men for using words in any sense they please, or with as many meanings as they please, but the duty of the scientific enquirer is to distinguish the meanings of an important word from one another, to select the meaning appropriate to his own purposes, and consistently to employ the word during his investigations in this sense and no other." Maine, Hist of Early Institutions, 7 ed., 374.

law do not justify this view. As every one knows, there are interests or rights which are highly protected and other interests which are only moderately protected. There is the almost absolute protection given to a landowner against the physical entry of others on his land, and there is the comparatively limited protection given to the same man against the institution of an unfounded criminal prosecution.

When A sues B for inducing C to refrain from entering into a contract relation with A, just what is the right in A which he claims has been infringed by B?

It is not a right to compel C to contract with him. Indeed it is not a right against C at all. It is a right against third persons that C should be left reasonably free to contract with A; that no improper means should be used by them to restrain C from contracting with A.¹ "The peculiar element of the newly recognized² right is that it is an interest which one man has in the freedom of another."³ It is a right to a reasonably free market, freedom on both sides of the market, freedom on the part of both buyer and seller of goods and labor.⁴ "... a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him."⁵

It may be said that when C declines to enter into a contract with A, A "loses nothing to which he has a legal right, and he has no legal ground of complaint against the person who refuses to contract with him."⁶ This may be true as between A and C; but *non constat* that A is remediless against B, if B's unlawful interference prevented C from entering into a contract which he

¹ "It must be constantly borne in mind that the purpose of this action is not to compel the manufacturers, against their will or disposition, to sell their goods to the plaintiff, but its purpose is to enjoin the association, its active members, committees, and agents, from compelling manufacturers or dealers against their will to refuse to sell their property to the plaintiff, by a system of intimidation and boycotting." Dissenting opinion of Martin, J., in *John D. Park v. National, etc.*, 175 N. Y. 1, 42.

² Better "newly formulated."

³ *Stevenson, V. C.*, in *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 765.

⁴ See *Stevenson, V. C.*, in *Atkins v. Fletcher Co.*, 65 N. J. Eq. 658, 664, and also in 63 N. J. Eq. 766.

⁵ Lord Lindley in *Quinn v. Leathem*, [1901] A. C. 495, 534.

⁶ "He could not have sued the Gibson Mill for discharging him at the end of the day. How, then, can he sue the defendant company for procuring the Gibson Mill to do something which it had the legal right to do?" Connor, J., in *Holder v. Cannon Mfg. Co.*, 138 N. C. 308, 309.

would otherwise have made with A. It may be within C's legal right, as against A, to refrain from doing a certain act, but it does not necessarily follow that it is within B's legal right, as against A, to induce C to refrain.¹ The existence of this right or interest claimed by A against third persons is conclusively established by the cases which hold B liable to A where B has, by force, prevented C from entering into business relations with A.² The only question is, how fully does the law protect the interest which it thus clearly recognizes? Is it protected only against methods of the kind denominated "intrinsically unlawful," or is it protected against other methods which exceed the proper limits of economic struggle?³

There are two views, which represent opposite extremes:

One view is that there is a specific right which the law protects as fully as the right to have one's land free from invasion. Any interference, by any method, with my right to have other persons left free to contract with me is not only a *prima facie* tort, but a tort which can seldom be justified. The "right" is not to be violated with impunity, unless under circumstances as exceptional as those required to justify an entry on real estate, or at least as exceptional as those required to justify the inducing of a third person to break his contract.⁴

Another view is that the mere fact of successful interference does not *per se* give a *prima facie* cause of action. There is no action unless the method of interference is in itself an actionable tort, *e.g.*, force. On this theory the law takes notice of my violated right so far as to include it as an element in the assessment of damages when a tort has been committed apart from the caus-

¹ In *Jacobs v. Cohen*, 183 N. Y. 207, it was held that an employer could not avoid a note given to secure the performance of his contract with a union to employ exclusively union workmen. But it does not necessarily follow that the union might not be liable to a non-union workman thus prevented from obtaining employment, if any unlawful means were used to induce the employer to enter into the contract for exclusion. "Whatever the contracting parties may do if no one but themselves is concerned, it is evident that, as against the workman, a contract of this kind does not of itself justify interference with his employment, by a third person who made the contract with his employer." Knowlton, C. J., in *Berry v. Donovan*, 188 Mass. 353, 357.

² Lord Halsbury, in *Allen v. Flood*, [1898] A. C. 1, 71, 72.

³ The limit of a plaintiff's right, the extent to which the law will protect it, may be marked out by stating how far a duty is imposed on a defendant to respect that right, to refrain from interfering with it.

⁴ See the opinion of Cave, J., in *Allen v. Flood*, [1898] A. C. 1, 29, 34, 36; and also the comments of Prof. Lewis, 42 Am. L. Reg. (N. S.) 149.

ing of this damage. But the law does not regard the damaging violation of this "right" as constituting in itself a substantive cause of action. This is the view advocated by Mr. Cohen in his memorandum accompanying the Report of the Royal Commission on Trade Disputes and Trade Combinations, pp. 24-30. He discusses the question, "Is a person liable for doing any act which, though not in itself an actionable tort, amounts to an interference with or molestation of another person in his trade, business, or employment?" This question he answers in the negative; quoting largely from the opinions of some of the Law Lords in *Allen v. Flood*. A majority of the Commissioners in their Report, article 66 (4), recommended the passage of an act, "To declare that an individual shall not be liable for doing any act not in itself an actionable tort only on the ground that it is an interference with another person's trade, business, or employment."¹

It is submitted that the truth lies between these two extremes.

The plaintiff's right in such a case is not a specific right of the kind fully protected against all interference. It is, however, included in the broad general right that a man shall not be intentionally damaged by any one unless there is a justification.² The proposition under which the action should be allowed is a wide proposition, not concerned solely or specially with the right to acquire property or the right to be free from interference in the formation of business relations.

General formulas have been laid down which cover torts in general, and in their application are not confined to this particular class of cases.

"At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse." Bowen, L. J., in *Skinner v. Shew*.³

¹ According to the Solicitors' Journal for Nov. 17, 1906, the Trade Disputes Bill, which had passed the House of Commons and was then before the Lords, contains a clause "which excludes liability in trade disputes where there has been an inducement to a person to commit a breach of contract, or where there has been an interference with some person's business or employment, or his right to dispose of his capital or his labor as he wills."

² See 22 L. Quar. Rev. 118.

³ [1893] 1 Ch. 413, 422.

In *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 613, the same judge said: "Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse."

This differs from the statement in *Skinner v. Shew* in two respects. First, the

"X, who intentionally causes *damage* to A, has *primâ facie* done an *injury* or wrong to A, and if X can show no legal justification for the damage he has thus intentionally done to A, he is liable to an action by A." Professor A. V. Dicey.¹

"It has been considered that, *primâ facie*, the intentional infliction of temporal damages is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape." Holmes, J., in *Aikens v. Wisconsin*.²

"It is submitted that the discussion would be materially simplified if it were understood that all damage wilfully done to one's neighbor is actionable unless it can be justified or excused." Sir Frederick Pollock.³

"The wilful causing of damage to another by a positive act, whether by one man alone, or by several acting in concert, and whether by direct action against him or indirectly by inducing a third person to exercise a lawful right, is a tort unless there was just cause for inflicting the damage; . . ." Professor Ames.⁴

The above statements of Bowen, Dicey, Holmes, Pollock, and Ames all seem to imply that the causing of the damage in question was the object immediately aimed at by the defendant. But they do not necessarily import the doing of damage "for the sake of the harm as an evil in itself, and not merely as a means to some further end legitimately desired." On the contrary, the desire to cause the harm is entirely consistent with the absence of personal ill will towards the plaintiff, and also with the existence of an ultimate good motive on the part of the defendant. Conceding that damage as such, *i.e.*, because it is harmful or damaging to the plaintiff, is the very object immediately desired, yet it may not be the ultimate end which is sought to be attained.⁵

statement in the *Mogul* case is, as Sir Frederick Pollock points out (22 L. Quar. Rev. 118), "limited in terms to damage to property or trade." Second, the statement in the *Mogul* case seems broad enough to include damages which, though they might have been foreseen as probable incidental results, were not specifically desired by the doer either as an end or as a means to an end.

The second suggestion would also apply to the proposition enunciated by Judge Holmes, in 8 HARV. L. REV. 9, ". . . when a responsible defendant seeks to escape from liability for an act which he had notice was likely to cause temporal damage to another, and which has caused such damage in fact, he must show a justification."

¹ 18 L. Quar. Rev. 4.

² 195 U. S. 194, 204.

³ Pollock, Torts, 7 ed., 319. See also Sir Frederick Pollock's vigorous criticism of Mr. Cohen's position, "that there is no general rule of law that a person who by some act intentionally does harm to another is *primâ facie* liable to him." 22 L. Quar. Rev. 118.

⁴ 18 HARV. L. REV. 412.

⁵ See Prof. Terry, in 20 L. Quar. Rev. 22.

We think that the law should be held to go as far as the above general statements of Bowen, Dicey, Holmes, and Pollock, and the more specific statement of Professor Ames; and we believe that these propositions are wide enough to cover a large proportion of the so-called "labor cases" which have come before courts in recent years. But (and this is a consideration which may sometimes have been overlooked) none of the above general formulas can be regarded as containing in themselves a complete statement of the law. Like any other general statement of legal doctrine, they do not stand alone. Each is modified and limited as to its operation by the application of other legal doctrines, so that the resultant force of the whole may bring about a result differing from that which would be reached by the application of any one of the doctrines taken by itself alone.¹ Each of the preceding formulas is subject to the implied exception that the damage and the method of producing the damage must be such as the law will notice and will hold actors responsible for. For various reasons the law deems it inexpedient to afford a remedy for some kinds of damage which cannot be sheltered under the maxim *De minimis*. Certain kinds of conduct and certain methods of exercising so-called "rights" are not regarded as furnishing a cause of action, even though substantial damage results therefrom.

In discussing any specific case the question of *prima facie* liability should be considered separately from, and prior to, the question of justification. This proposition, so obvious that it seems idle to enunciate it, has sometimes been overlooked, and with unfortunate results. No doubt in this class of cases the great struggle will frequently come on the question of justification; what acts fall within the legal limits of competition; what may justifiably be done in defense of one's own interest. But there can be no rational discussion of justification until we have first settled what sort of conduct requires to be justified and why it so requires. We must first have a clear idea of what constitutes *prima facie* liability. At present we are liable to have decisions which do not make it plain whether the turning issue was that of the existence or non-existence of *prima facie* liability, or the existence or non-existence of justification. And decisions may sometimes be based on one of these issues which really should have turned on the other.

¹ See Bishop, *Written Laws*, § 118*a*.

We now take up a specific case falling under the general subject of this article; a typical labor case which, in some form or other, is not infrequently brought before the courts.

A, who is a laborer, desires to be employed by C. B, a single man not acting in combination with others, induces C not to employ A, whom C would otherwise have employed. Defamation, fraud, or force, or threats of force, are not among the methods of inducement used by B. There is no tort or breach of legal duty on B's part towards C. Nothing is done by B which would give C an action against B for tort or breach of contract. Is B *primâ facie* liable to A? Must B show a justification? ¹

The answer may depend on the nature of the methods used by B, the particular instrumentalities used, to induce the refusal by C.²

The methods, other than those which are *ex hypothesi* excluded, may be divided into two main classes; and these again can be subdivided:

Class 1. Where defendant B uses only his own conduct, or his own property, as a lever; and therewith operates directly upon C, the possible employer of the plaintiff A.

Class 2. Where defendant B uses an outsider, or fourth person, as a lever, whereby he operates indirectly upon C, the possible employer of the plaintiff A.

In every case of this sort there are inevitably three parties involved, although only two of them are parties to the litigation. They are (1) the plaintiff, or would-be employee; (2) the possible employer with whom the plaintiff is seeking to contract; (3) the defendant who induces the possible employer to refrain from dealing with the plaintiff. In one sense the possible employer is a third person; *i. e.*, as between himself and the litigating parties, the plaintiff and defendant. By "outsider," or "fourth person," is meant some person other than the plaintiff, the defendant, and the possible employer.

¹ It is the same question in principle if C, a would-be employer of A, sues B for preventing A from entering C's employ.

As our hypothesis excludes the use of force or threats of force, we need not consider here the cases as to "picketing," nor the general question as to the unlawfulness of physical conduct or language intentionally causing molestation or annoyance. On the latter question see *Stevenson, V. C.*, in *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 768, 769.

² In some cases the report does not distinctly state the method whereby the defendant "induced" another person to cease dealing with the plaintiff.

We now take up cases falling under Class 1, *ante*, and proceed to discuss certain methods which may be grouped in two divisions:

Division A. Simple persuasion exerted directly by defendant on C, the possible employer of plaintiff.

Division B. Temporal inducement. Offer by defendant to possible employer of temporal advantage if he does not employ plaintiff; or threat of temporal disadvantage if he does employ plaintiff.

To consider these different methods in detail:

Division A. In the case of inducement by simple persuasion, we think there should be no action. The law pays high regard to freedom of speech in the absence of fraud or defamation. The question what the law should notice and afford remedy for is one of expediency, calling for a balancing of advantages and disadvantages. The harm likely to be caused by persuasion to refrain from contracting does not appear to be so great as to make it expedient to interfere with the liberty of speech in this respect.¹

A different case is presented where B consciously persuades C to commit a battery upon A or to break a contract with A. There B instigates C to commit a breach of legal duty owing from C to A. "The act caused by the persuasion being an unlawful act, the act of persuasion becomes unlawful."² In such a case the persuader or instigator ought to stand no better than the individual who at his instigation personally commits the breach of duty.³

Should an action be allowed for simple persuasion to refrain

¹ In cases usually cited under the law of defamation there are some strong instances of denying remedy for harm intentionally caused by speech: *e.g.*, where illness in plaintiff is either caused by the defendant's utterance to others of defamatory words not actionable *per se*, or is caused by the defendant's uttering to the plaintiff, in the absence of third persons, charges which are actionable *per se*.

² Prof. Lewis in 42 Am. L. Reg. (N. S.) 137.

³ In a note to *Allen v. Flood*, in Kenny, *Cas. on Torts*, 187, it is said: "The student must be careful to observe that the advice here declared to be lawful was not advice to break an *existing* contract (which it would be illegal to break), but only to abstain from creating a new contract (an abstinence which would involve no illegality)."

In *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239, the House of Lords decided that "to break a contract is an unlawful act," and that one who procures another to break a contract also acts unlawfully. See Lord Lindley, p. 253, and Lord James of Hereford, p. 250. The weight of authority in the United States sustains this doctrine.

According to the statement in the *Solicitors' Journal* for Nov. 17, 1906, quoted *ante*, p. 262, the bill which has recently passed the House of Commons contains a clause reversing the doctrine of the Glamorgan case. Such legislation in any of the American states which have affirmed the same doctrine might be held unconstitutional.

from entering into a contract, if the persuader's ultimate motive were bad? We think not. It does not seem expedient to permit the question of motive to be litigated nor to submit the issue to the decision of a jury. (The materiality of motive will be referred to again later.)¹

Before considering Division B, as to temporal inducement, allusion perhaps should be made to a method intermediate between simple persuasion and temporal inducement; namely, the threat of discontinuing social intercourse, or more broadly the threat of social ostracism, but not including the threat of any damage in a business point of view. We do not think that inducement by such a method should be actionable. Such seems to be the view of Judge Holmes and Vice-Chancellor Stevenson.² Causing social ostracism is not held sufficient special damage to justify an action for untrue defamatory statements not falling within the class of charges actionable *per se*.³

We now take up Division B: Temporal inducement; offer by defendant to possible employer of temporal advantage if he does not employ plaintiff; or threat of temporal disadvantage if he does employ plaintiff.

This again may be further subdivided into

(B 1) Where the inducement consists of money or some other tangible object of property.

(B 2) Where the inducement consists in an offer to exercise, or a threat to refrain from exercising, defendant's right to work, his personal right to labor or not to labor.

As to (B 1). Even if the difference between the cases of simple persuasion and pecuniary inducement is held to be only one of degree, this does not necessitate a decision in favor of immunity in the latter case.⁴ Judge Holmes has said that most differences

¹ Our view is strongly sustained by various opinions in the House of Lords in *Allen v. Flood*, [1898] A. C. 1. There is now some controversy as to what was actually decided in that case. As to this, see Lord Lindley in *Quinn v. Leatham*, [1901] A. C. 495, 533.

For a contrary view as to the effect of bad motive, see Holmes, C. J., in *Moran v. Dunphy*, 177 Mass. 485, 487; *Erle*, Trade Unions, 23.

² *Vegelahn v. Guntner*, 167 Mass. 92, 109; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 769.

³ See *Roberts v. Roberts*, 5 B. & S. 384.

⁴ "... there is no practical impossibility in drawing a line between persuasion by argument and persuasion by the offer of money or a thing of value" (*e.g.*, the exercise of the right to work). 42 Am. L. Reg. (N. S.) 130.

are, when nicely analyzed, only differences of degree.¹ A threat of pecuniary loss, or an offer of pecuniary gain, differs materially from simple persuasion. It is more likely to be effective. If such threats or offers can be indulged in with impunity, there is hardly any limit to the damage which a rich or powerful man can safely cause to his weaker neighbors.² Such a threat or offer is an obstruction of the plaintiff's right within the spirit of Sir William Erle's proposition:

"Restraint of the free course for trade in labor by acts of molestation or obstruction, which are not otherwise unlawful, but which operate as hindrances to the exercise of a trade, and which are done for the purpose of such hindrances without justification, seems to me . . . an actionable wrong."³

Such threats or offers of direct pecuniary inducement are seldom made except in cases where there is a plausible justification on the ground of competition.⁴ Hence the question whether they give rise to a *prima facie* cause of action has not often been discussed. But we think that the decision in *London, etc., Co. v. Horn*⁵ really rests upon the ground that such a threat is *prima facie* actionable; and this seems correct on principle.

As to (B 2). When the inducement consists in an offer to exercise, or an offer to refrain from exercising, defendant's right to work, his personal right to labor or not to labor.

Take the following illustrative case:

Defendant B, when all employments and engagements are terminable at the will of either party, threatens to leave the employ of C, unless C drops the plaintiff A or refuses to employ A. C is thus induced to drop A or to refuse to employ A.⁶

¹ See *Rideout v. Knox*, 148 Mass. 368, 372.

² A applies for employment in C's factory. B, who has no interest in C's business, gives C \$100 on condition that he refuses to employ A. C is thus induced to refuse A employment.

Has not A a *prima facie* cause of action against B? Must not B show a justification?

³ Erle, *Trade Unions*, 20.

⁴ It has been thought that unionist strikers may be justified in paying weekly benefits to laborers who have ceased to work for the strikers' former employer and have joined the union, or in paying other laborers to induce them to refrain from taking the places just vacated by the strikers. See *Everett Waddey Co. v. Richmond, etc., Union*, 53 S. E. Rep. 273 (Va., 1906), and 18 HARV. L. REV. 432. Cf. Lord James of Hereford, in *Denaby, etc., Collieries v. Yorkshire, etc., Ass'n*, 95 L. T. R. 561, 566.

⁵ 206 Ill. 493.

⁶ Or suppose that defendant B offers to enter into the employ of C, on condition that C refuses to hire plaintiff A; and that C is thus induced to refuse to hire A.

It is assumed that the result which followed was the object immediately desired and aimed at by B.

Various good justifications for such conduct on the part of B can easily be imagined. But our present inquiry is not what would constitute a sufficient justification, but whether B is under any obligation to prove a justification. Is there a *prima facie* cause of action against B?

Unquestionably B has a right not to work as well as a right to work.¹ It may be conceded, too, that these rights are in the nature of property assets. But are they more so than B's right to money in his pocket? If B cannot use his tangible property as an instrument of causing desired harm to the plaintiff A, "without any other justification than the abstract right to do as he pleases with his own,"² can he so use his "personal rights"? Are the rights to labor and not to labor so absolute and unqualified that no action can ever lie for damage intentionally caused by their exercise (damage specifically aimed at and desired by the actor)?³

In some quarters an affirmative answer might be returned to these inquiries. It might be said: "No matter if the plaintiff had an interest which the law would to some extent recognize and protect. The defendant has violated no duty. He has simply been exercising an absolute legal right. Hence he has not incurred even a *prima facie* liability, and cannot be called on to justify."

We think that the above proposition, supposed to be taken in behalf of the defendant, is open to several objections, apart from the use of the word "absolute."

1. It assumes that, if certain conduct of B does not violate any legal right of C, it cannot infringe a legal right of A.

2. It overlooks the distinction between unconditionally exercising a right, and offering to exercise it (or to refrain from exercising it) on condition that the offeree shall take action which is intended to produce (and does produce) damage to a third person.

3. It assumes that one who intentionally instigates a second person to inflict damage on a third person can escape responsibility by putting the instigation in the form of a conditional offer to exercise, or to refrain from exercising, a right which he had against the second person.

What is the right to work or not to work? What are its qualifications or limitations? Can a laborer intentionally use this right

¹ See Lord Herschell in *Allen v. Flood*, [1898] A. C. 1, 138.

² See 37 Am. L. Reg. (N. S.) 288.

³ See Prof. Lewis, in 18 HARV. L. REV. 450.

as a lever to induce a second person (a possible employer) to exercise *his* right in a manner damaging to a third person, but not involving tort or breach of contract on the part of the second person? That is, can the laborer so use this right without making himself *primâ facie* liable to the third person; *i. e.*, without being required to show some special justification?¹

Undoubtedly it is a right as against all the world, against third persons as well as against employers, to refrain from entering into employment or to quit an employment which is terminable at will, without being required to show a special justification and without having to answer to the employer for purpose or motive. And this may include a right to give absolute and unqualified notice of intention to leave.

It may also include, *as against an employer*, a right to annex any possible condition to an offer to work or to a threat to refrain from working. By "right as against an employer" we mean that an employer could not maintain an action against a laborer for annexing such conditions. The employer is not legally damaged by such an offer. He is not bound to accept it. As between B and C, the person with whom B is directly dealing, it may be true that "the right to refuse to deal involves the right to name any terms which one pleases, and to refuse to deal except on these terms." C cannot maintain an action against B for insisting on unreasonable terms. But "the terms or conditions annexed to an offer may relate to the offeree's relations to a third person, and [if the offeree

¹ "But it is said that it cannot be unlawful for an employee either to threaten to quit or actually to quit the service when not in violation of his contract, because a man has the inalienable right to bestow his labor where he will, and to withhold his labor as he will. Generally speaking, this is true, but not absolutely. If he uses the benefit which his labor is or will be to another, by threatening to withhold it or agreeing to bestow it, or by actually withholding it or bestowing it, for the purpose of inducing, procuring, or compelling that other to commit an unlawful or criminal act, the withholding or bestowing of his labor for such a purpose is itself an unlawful and criminal act. The same thing is true with regard to the exercise of the right of property. A man has the right to give or sell his property where he will, but if he give or sell it, or refuse to give or sell it, as a means of inducing or compelling another to commit an unlawful act, his giving or selling it or refusal to do so is itself unlawful. . . .

"What the employees [of the defendant companies] threaten to do is to deprive the defendant companies of the benefit thus accruing from their labor, in order to induce, procure, and compel the companies and their managing officers to consent to do a criminal and unlawful injury to the complainant. Neither law nor morals can give a man the right to labor or withhold his labor for such a purpose."

Taft, J., in *Toledo, etc., R. R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730, 737, 738. The above applies more especially to the first case stated on the next page.

accepts and performs the conditions] that may raise a question whether such third person has any ground of complaint.”¹

We think that the right to work or not to work does not include, *as against third persons*, the right to annex any possible condition to an offer to work or to a notice of intention to refrain from work.² Suppose that B offers to work for C on condition that C commits a battery on A. Could B effectively deny that he instigated the commission of the battery? Could B escape liability to A on the ground that he was merely stating to C the conditions on which he was willing to exercise his right to labor or not to labor?

Take another case where the damage suffered by the plaintiff, proceeding immediately from the conduct of the offeree instigated by the defendant, has not involved the commission of an actionable tort on plaintiff by the offeree (is not such as to form the basis of an action of tort by plaintiff against the offeree):

B, whose employment is terminable at his will, notifies C that he will cease working for C unless C ceases to sell provisions to A; B knowing that it is practically impossible for A to seasonably obtain provisions from any other source. C thereupon ceases to sell provisions to A, and A suffers the pangs of starvation, as B desired that he should.

The only difference between this latter case and the former one consists in the nature of the conduct instigated by the defendant. In the first case the conduct induced was unlawful on the part of the third person, the offeree. In the second it was not. But this distinction does not affect the fact that the act of C in both cases was due to defendant's inducement. Some courts might, perhaps, exonerate the defendant in the second case on the ground that the act which he instigated was not a tort on the part of the “instigatee” (the offeree). But no court could reasonably exonerate him on the ground that he did not instigate the act of the offeree.

No doubt a man may abstain from work without being answerable for his intent or motive. He may refuse at his pleasure.

¹ See 43 Am. L. Reg. (N. S.) 84, 88.

² See the recent case of *March v. Bricklayers, etc., Union*, 63 Atl. Rep. 291 (Conn.), stated more fully, *post*, under “Justification.” Defendants refused to handle bricks purchased by their employer from the plaintiff, unless plaintiff first paid the union \$100. Plaintiff paid, and was then allowed to recover back the payment, which was regarded as an act of extortion both at common law and under the Connecticut statute.

There is no general duty which forbids him to abstain.¹ But in the case now under consideration, B's conduct is not merely negative; it is not pure non-feasance; it is not simply refraining from work, not simply exercising his right to work or not to work. His action is positive, affirmative, and on its face of a decidedly aggressive nature. He is not merely exercising his right to abstain from work. He is attempting to use that right (or rather he is threatening to use that right) as a lever to induce C to take action damaging to A.

B has a right to quit C's employ. C has a right to refuse to further employ A. How can the exercise of two independent rights by separate persons constitute a tort on the part of either? It may be conceded that there can be no action if each exercises his own right without inducement from the other. But here B is not sued for simply exercising a right which he himself possessed. He is sued for inducing another person to exercise a right which that other person possessed, and to exercise it to the damage of the plaintiff.² Indeed B has not been exercising his right to quit work. He has, rather, been making a conditional offer to refrain from exercising that right; the condition being that the offeree shall take action which will cause damage to the plaintiff, and the production of such damage being an object specifically desired by B.³

¹ "The general duty is a negative one only, not to do malicious acts. There is no general duty which forbids a person to abstain from acts even maliciously; generally he may refuse to act at his pleasure." Prof. Terry, in 20 L. Quar. Rev. 20.

² See Mr. Justice Wm. O'Brien, in *Leathem v. Craig*, Ireland [1899] 2 Q. B. & Ex. D. 667, 694.

³ In *March v. Bricklayers, etc., Union*, 63 Atl. Rep. 291 (Conn., 1906), stated more fully *post*, under "Justification," Prentice, J., said: "It is attempted to justify the action of the union in its money demand upon the proposition that, as its members had the right to decline to handle the plaintiff's brick, they had the right to waive the exercise of that right upon such conditions as they might impose. The proposition is that money demanded and obtained as the price of forbearance from the commission of an act of injury, even when the commission of that act is held over the man to coerce and intimidate him into compliance with the demand, is lawfully obtained, if the threatened act was one which the threatener might lawfully do. Such a proposition could oftentimes be used to justify the vilest blackmailer, and is palpably unsound, in that it ignores certain elements which may be present to convert the proceeding into a wrong or crime."

In the case stated in the text, B did not exercise the right of quitting work. He "merely used the potential power to exercise it, as a means of depriving" A of employment (as a means of preventing C from continuing to employ A). See 10 Case and Comment 137.

For an authority contrary to our view as to a *prima facie* case, see *Clemitt v.*

In truth the defendant's right, to work or not to work, is not an absolutely unqualified right. He is entitled to freedom in disposing of his own labor only so far as the exercise of such freedom on his part "can be made compatible with the exercise of similar rights by others."¹ The defendant's right is limited or qualified by the plaintiff's correlative right. The defendant is not entitled to exercise his right in such a manner as to intentionally and unnecessarily prevent the plaintiff from enjoying the plaintiff's right to dispose of *his* labor. The plaintiff is entitled to have a possible employer left reasonably free to deal with the plaintiff. The defendant cannot unreasonably interfere with this right of the plaintiff.

Several objections are likely to be urged against the foregoing views.

It will be said that a man has the absolute right to threaten to do that which he has a right to do.² Granted that what you may absolutely do you may absolutely threaten to do (give unqualified notice of your intention to do). But it does not follow that you may conditionally threaten to do it. The right to absolutely refuse to work and the right to conditionally refuse do not, as against third persons, *i. e.*, persons other than the employer, stand to each other in the relation of the greater to the less. The former does not necessarily include the latter. They are distinct from each other; and the latter may sometimes be the more important and the more dangerous right of the two. Some illustrations of the dangers have already been given.

"May not a man," it will be asked, "give reasons for quitting work? Cannot he give reasons to his employer without subjecting himself to an action by a third person?"³

The answer is, that his liability may depend on the intention with which he gives the reason. If the so-called "giving of a reason" by B to C is thinly veiled instigation to C to discharge A; if it is, in fact, a veiled offer to remain or to return if A is dis-

Watson, 14 Ind. App. 38 (assuming there that defendants notified the employer of their determination to quit unless plaintiff was discharged).

Our view is also opposed to the opinions of several of the Law Lords in *Allen v. Flood*; taking the facts to be as those Lords then understood them.

¹ See Erle, *Trade Unions*, 12.

² See Parker, C. J., in *Nat'l Protective Ass'n v. Cummings*, 170 N. Y. 315, 329; and Holmes, J., in *Vegelahn v. Guntner*, 167 Mass. 92, 107.

³ See in *Allen v. Flood*, [1898] A. C. 1, Lord Watson, p. 99, Lord Herschell, pp. 130, 139, Lord Shand, p. 166.

charged; if it was given with the desire and expectation of bringing about A's discharge and has accomplished its purpose, then B ought not to escape liability to A on the ground that he has simply been giving a reason for his conduct. If B intended to thereby cause damage to a third person (now plaintiff), B should be put to his justification. Whether the reason was or was not volunteered would not be decisive on the question of intention. The giving of a reason may be withheld at the moment of leaving or giving notice with the idea that it will certainly be asked for, and that it will be more effective if given in answer to inquiry.¹

It may further be asked why intention should be made a subject of judicial inquiry and a test of liability, when motive is not deemed material. Taking the terms "intent" and "motive" in the significations in which they are used in this article,² there is good cause for such a distinction. Intent is easier of proof than motive. There is much less chance of mistake or prejudice in the finding of a jury upon the question of intent than upon the question of motive. "The field of motives," says Mr. Bentham, "is an open and ample field for the exercise, not of mendacity only, but of bias."³ In civil suits intent is a material issue much more frequently than motive. Defendant's right would be much more impaired if he were compelled to litigate the question of his motive than if he were compelled to litigate only the question of his intention.

An argument like the following is sometimes advanced:

An actual strike against the employment of a man obnoxious to the strikers is frequently more effective than a mere threat to strike. But in

¹ During the argument in *Allen v. Flood*, [1898] A. C. 1, the question was suggested whether a cook is liable to a butler if she induced the master to dismiss the butler by threatening to leave herself if the butler were retained (it being apparently assumed that all employments were terminable at the will of either party). *Cave, J.* (p. 36), thought the cook liable in the absence of just cause or excuse. *Lord Herschell* (pp. 138, 139) thought the cook was not liable, and *Lord Shand* (p. 166) thought her not liable, even though actuated by the motive of personal ill will to the butler. In 18 *HARV. L. REV.* 419, Professor Ames says that the answer depends on the motive of the cook, who would be liable, if, having no objection to the butler as a companion, she procures his dismissal from pure malevolence. We submit that it would depend upon the intent with which she made the threat. The cook had, of course, a perfect right to leave the service "even from caprice." But it does not follow that she can conditionally threaten to quit; the conditional threat being uttered with the specific intention of thereby causing the dismissal of the butler. She should be liable in the absence of justification.

² See *ante*, pp. 256, 259.

³ 1 Bentham, *Rationale of Jud. Ev.*, 1827 ed., 145.

case of an actual strike there is no action. Why then should a mere threat to strike be held actionable?¹

It is a mistake to assume that there can never be an action in the case of an actual strike. *The employer* may have no action against the strikers, if their employment was terminable at their own will. But a *third person* intended to be damaged, and actually damaged thereby, may sometimes have a remedy. If the strikers give the fact that the employer has hired A as their sole reason for quitting, and they seek no new job, their conduct may amount to an offer to return on condition that A is discharged. As already suggested, the fact that the reason was not given until after leaving would not necessarily differentiate the case in principle from that of a conditional threat to leave. In both cases the defendant is using the same "right," with the same purpose and with the same result.

If the preceding views are correct, why does it not follow that *an employer* may sometimes have an action against his striking workmen, although they have not broken any contract? Suppose that workmen whose employment is terminable at the will of either party leave their job in such an unfinished condition as to inevitably entail great loss on their employer C, and that they left with the specific desire of causing such loss. Now if B, a third person, can sue the workmen when they quit working for C with the specific desire of causing B's discharge, why cannot C, the employer, sue the workmen when they quit work with the specific desire of causing loss to him (C)?

The answer is threefold:²

First: As against C, the employer, the conduct of the workmen is purely negative, a mere nonfeasance. It is the "discontinuance of a service at will."³

Second: One party to a contract is not liable to the other for exercising his contract right against the other party, no matter how bad his motive.

Third (perhaps an application of the last proposition): C could have protected himself against such action on the workmen's part. The relation

¹ See 43 Am. L. Reg. (N. S.) 94.

² It is here taken for granted that the employer has no action against the workmen; and such was the decision in *Karges Furniture Co. v. Amalgamated, etc., Union*, 165 Ind. 421, 428, 429. See, however, *Erle, Trade Unions*, 74, apparently tending to the contrary view.

³ See Prof. Ames, in 18 HARV. L. REV. 416, n. 1, as to the "fundamental distinction between a malevolent act and a malevolent non-feasance."

between C and his workmen is contractual; it arises out of contract. C could have refused to employ the workmen except under a contract for a definite time; in which case he would have had a remedy for breach of contract if they left earlier.¹ Where the relation between the parties is contractual, the law is slow to give either party a remedy in tort against the other for conduct which might have been made the subject of express stipulation in the contract. But in the present case B, the third person, sustained no contractual relation to the workmen. He had no opportunity to protect himself against them by inserting terms in a contract between himself and them; and hence he has not waived any such right.

Are, then, striking workmen *prima facie* liable for all damage sustained by third persons, which can be traced to their strike as its cause? Must they show a justification for all such damage?

Our argument does not go so far. We are contending that, when they act affirmatively and aggressively, they are *prima facie* liable for damage to third persons which was immediately aimed at by them, the specific object aimed at, the very result desired. The case may be different as to damage which is merely incidental, the happening of which might have been expected as an incident of the attempt to accomplish that object. Fall River strikers, who exercise their right to quit work, are not liable to Fall River store-keepers for loss of trade which is an incidental result of the strike.² It is mere non-feasance to cease working in the factory. If, by reason of defendants' ceasing to work, the operation of the factory is suspended and a trader thereby loses all his customers, the defendants would not be liable (not even, as we think, upon proof that this result was intended).³ But it is a very different matter when a trader loses the custom of a mill owner, because of the workmen's threatening to stop work unless the owner ceases to

¹ "It is said that the company were in the power of the men because of the business loss to which the withdrawal of the men would subject them. But to what was this due, if not to the act of the company themselves in employing these men under a contract which either party might any day determine?" Lord Herschell in *Allen v. Flood*, [1898] A. C. 1, 130.

² In the efforts of workmen to better their condition, "they may inflict more or less inconvenience and damage on others. But these results should be incidental damage and inconvenience consequent on the operation of general rules, lawful in themselves, rather than those which follow a specific intent and immediate purpose of injury to others in order that good may ultimately come to themselves." *Brown, J., in Purvis v. Local, etc.*, 214 Pa. St. 348.

³ See *Clemitt v. Watson*, 14 Ind. App. 38, where recovery was denied to a plaintiff thrown out of work by the suspension of business resulting from defendants' quitting work.

deal with the trader. In the latter case the conduct of the workmen is affirmative and aggressive, not merely negative.

Thus far we have been discussing cases falling under Class 1, namely: Where defendant B uses only his own conduct, or his own property, as a lever; and therewith operates directly upon C, the possible employer of the plaintiff A.

We now proceed to cases falling under Class 2, namely: Where defendant B uses an outsider (or fourth person) as a lever, whereby he operates indirectly upon C, the possible employer of the plaintiff A.

When is there a *primâ facie* liability on the part of B?

This will depend upon what the outsider does, and the methods whereby B induces him to do it. (It is assumed that the defendant does not use or threaten to use any means as against the outsider which would give the outsider an action against the defendant.)

Subdivisions of Class 2 may now be considered:

Subdivision (1). Defendant simply persuades outsider to persuade employer not to hire plaintiff.

Subdivision (2). Defendant persuades outsider to threaten to ostracize (to withdraw from social intercourse with) employer of plaintiff.

Subdivision (3). Defendant, by threat of ostracizing outsider, induces outsider to threaten to ostracize employer of plaintiff.

As to subdivisions (1), (2), and (3) under Class 2, we think that there is no *primâ facie* liability; the reasons being similar to those given in regard to the use of similar methods under Class 1, *ante*. True the case under Class 2 is stronger, in that another person is brought into the war; but he is not brought in by methods which are likely to produce serious damage in the majority of cases.

Subdivision (4). Defendant persuades outsider to offer temporal inducement to possible employer of plaintiff; promise of temporal advantage or threat of temporal disadvantage.

Subdivision (5). Defendant by bringing temporal inducement to bear upon outsider (promise of gain to outsider or threat of loss to outsider), induces outsider to persuade (use simple persuasion on) possible employer of plaintiff.

Subdivision (6). Defendant, by offer of temporal inducement to outsider, induces outsider to offer temporal inducement to possible employer of plaintiff.

Subdivision (7). Defendant, by offer of temporal inducement to outsider number 1, induces outsider number 1 to offer temporal inducement to outsider number 2, to offer temporal inducement to possible employer of plaintiff.

As to (4), if we are right in the view heretofore expressed under Class 1, there is a *prima facie* liability here. According to that view, what the outsider does here is a tort on his part against plaintiff; and the defendant is liable as one who consciously persuades another to commit a tort.

As to (5), if we are right under Class 1, the defendant has here used a tortious method to induce the outsider to influence the employer; and hence is liable.

As to (6), if we are right in our views under Class 1, *ante*, then defendant is liable here on both the foregoing grounds; on the reasons suggested as to (4) as well as on the reasons suggested as to (5).

Suppose, however, that we are not right under Class 1; is there any other ground on which an action can be allowed in (4), (5), or (6)? We think there is. The difference between Class 1 and the latter cases is very great. The consequences to the plaintiff are likely to be much more serious. An outsider is brought in, who would otherwise have remained neutral; and either his action, or the method by which the defendant procures him to act, involves temporal inducements. At all events an action should lie in (6) where *both* elements are present; temporal inducement being involved both as to the method of bringing in the outsider, and in his own action after he enters the fray. And if the action lies in (6), then *a fortiori* it lies in (7).

In the cases under Class 1, the defendant influences the conduct of only one person, C. The only means or lever used to influence that person is a threat as to the future conduct of the defendant himself, a threat of loss which would result to C from the conduct of the defendant alone.

In subdivision (6) under Class 2, the defendant influences the conduct of two other persons, one of whom is an entire stranger to the controversy; and he uses the second to influence the first. If he can do this, then he can, as in (7), influence a third person to influence the second; or influence an indefinite number in succession to influence each other in turn. He can drag the whole community into his dispute.

Subdivision (8). The temporal inducement offered to possible employer of plaintiff (offered either by defendant or by one or more outsiders at defendant's instigation) consists of a threat, not only to cease dealing with the employer, but also to cease dealing with any one who deals with the employer as to any matter whatever.

In (8) the inducement used is, in effect, a threat to deprive the possible employer of the means of livelihood, to prevent him from earning money or from purchasing food. Such a threat can be carried out "to the degree of a person being starved." Whether there can be any possible justification for such a threat is a question to be considered later. But that this method of inducement is, at least, *prima facie* tortious seems clear.

Subdivision (9). The temporal inducement offered to possible employer of plaintiff consists in a threat of defendant to *order* another person to cease dealing with possible employer of plaintiff; the other person being one who is *de facto* under defendant's control, and who would obey the order if given by defendant. (Or assume that the order is given and obeyed; and that thereupon the employer discharges plaintiff in order to thereby obtain a revocation of the order.)

Subdivision (9) differs altogether from (1). He who gives a positive command which is obeyed cannot then say that he has merely *persuaded* the actor (the recipient of his order). The person who thus acts by the hand of another is in law responsible for the consequences. He cannot plead that it was wrong or foolish in the actor to obey him. That was the precise result which he desired.

The following topics remain to be considered:

1. Whether the members of a combination are liable for causing damage, if a single individual accomplishing the same result by the same method would not be liable?
2. What constitutes a justification?
3. Whether bad motive operates as a rebuttal of an otherwise sufficient justification?

Jeremiah Smith.

[To be continued.]

THE INCOME TAX AND THE CONSTITUTION.

THE committee of style of the constitutional convention of 1787 recognized in its famous report three kinds of taxation; namely, "direct taxes," "duties, imposts and excises," and the "capitation tax." The first and third of these were to be apportioned among the various states in proportion to their population as shown by the census. By a clause which had been already adopted and apparently dropped out in this report by some accident, and which was thereafter restored by unanimous vote, it was provided that the second class should be uniform throughout the United States. By a subsequent verbal amendment, moved on the floor for another purpose and passed without debate, the capitation tax came to be classed among the direct taxes, although it had been treated separately since an early stage of the proceedings of that body, including the report of the committee of detail. In the course of debate one prominent member asked what direct taxation was, and no one answered him.¹ This constitutional question has been debated from time to time ever since, apparently settled once, unsettled again, and still remains in doubt.

If we had fuller reports of what was said in the convention, and in the various state conventions which followed it, we might know better what the various leaders individually understood to be the meaning of these tax clauses. Unfortunately the proceedings of the main convention, very much condensed at best, are particularly meagre on this point. Its proceedings were secret, and it had no reporter. Madison has preserved for us an abstract of the occurrences which struck him at the time as important; but one of the most significant has been preserved only in a paper by another member,² and in an abstract so brief there must be many such omissions in matters of detail which would now be of the highest

¹ U. S. Const., Art. 1, §§ 2, 8, 9. See 5 Ell. Deb., 2 ed., 379, 451, 503, 543, 545.

² The hush word about stamp duties reported by Luther Martin (1 *ibid.* 368). Cf. Madison's abstract (5 *ibid.* 432). Of course it is possible that what Martin reports was not part of the formal proceedings; but this would only accentuate the fact that we are apt to overestimate the sufficiency of our information about what the framers of the Constitution had in mind.

value. Some of the most important of the state conventions are reported either by a mere fragment¹ or not at all.² Of the few which are more fully reported, we have naturally more of the oratorical elegances³ that were written out and handed to the reporter than we have of the actual discussions upon matters of dry practical detail,⁴ and while many of the speeches were evidently written out or abstracted by the speaker himself, the running debate is so badly reported as to be very unreliable as evidence.⁵ Probably the tax clauses did not convey the same ideas to the minds of all who voted upon them (a thing not unnatural when some were primarily economists, although most were primarily lawyers, and when the systems and nomenclature of taxation had always varied so radically in the different colonies⁶). All the different ratifying conventions may not have understood these clauses alike in every detail. Even in the main convention there were probably comparatively few who thought them out to their logical results, just as there were few who thought out what was involved in the power to regulate commerce; but it is improbable that the members who paid special attention to this subject did not understand each other, although it is altogether likely to have been one of those subjects which were threshed out during their evening discussions rather than upon the floor.⁷

Congress at once, and with the approval of the Washington administration, began giving a very wide scope to the "duties" clause. At its second session it laid a duty, upon the principle of uniformity, upon all country stills at a fixed rate per gallon capacity. This was intended for practical reasons as a substitute for

¹ New Hampshire, Connecticut, Pennsylvania, and Maryland.

² New Jersey, Delaware, and Georgia. Rhode Island held no convention.

³ See, *e. g.*, Massachusetts, 2 Ell. Deb., 2 ed., 174.

⁴ "Many questions were asked the honorable gentlemen who framed the Constitution, to which answers apparently satisfactory were given. . . . Mr. Parsons considered the several charges of ambiguity which gentlemen had laid to the Constitution, and with a great deal of accuracy stated the obvious meaning of the clauses thus supposed to be ambiguous." Massachusetts, *ibid.* 101, 104.

⁵ Thus it is not at all clear that Jay meant to include specific duties among direct taxes, as inferred in 157 U. S. 567 (see 2 Ell. Deb., 2 ed., 381), and I venture to believe that Marshall was clearer than he has been made to appear (157 U. S. 567; see 3 Ell. Deb., 2 ed., 229, 236).

⁶ Report of Oliver Wolcott, Secretary of the Treasury, December 14, 1796 (Annals of Congress, 1795-7, 2635-2713); E. R. A. Seligman, Colonial and State Income Taxes, 10 Pol. Sci. Quar. 221 *et seq.*

⁷ See 1 Sparks, Gouverneur Morris, 282-6.

the more usual form of excise upon the manufacture of liquor, but was in its essence, like the contemporary English duty on houses, a tax upon improvements to real estate.¹

In 1794 Congress imposed certain "annual duties and rates" upon carriages, whether "kept by or for any person for his or her own use, or to be let out to hire or for the convenience of passengers."² Economically, upon the test of shiftableness, the tax upon the first class of carriages would be direct, and upon the second class indirect. The constitutionality of the law was disputed particularly by Madison and other leading Virginians; and a test case for the recovery of sixteen dollars was made up in Virginia for the purpose of obtaining an opinion from the United States Supreme Court.³ It was argued early in 1796 before an array of judges every one of whom had been a member of the constitutional convention of 1787, or of one of the state ratifying conventions, or both.⁴ To this remarkable body of men was presented the precise question whether a duty upon an article of personal property kept solely for the enjoyment of its owner was

¹ Act of March 3, 1791, c. 81, § 21. The administration which recommended this bill included the president of the constitutional convention, one of the members of its committee of detail (Randolph), and one of the members of its committee of style (Hamilton). Wolcott thought a tax on houses indirect (Report, 2707, 2709). Nicholas thought the same of a window tax (*ibid.*, 2179), although Gallatin thought not (Annals, 1795-7, 1893). This is curious, since Nicholas has been quoted as a believer in the broader definition of direct taxes (157 U. S., at 567-8).

² 1 Stat. at L. 373, c. 32.

³ *Hylton v. United States*, 3 Dall. (U. S.) 171.

⁴ Ellsworth, C. J., who took no part in the decision because he had not heard the whole of the argument, but probably contributed to the information of the court, had been a member of the convention of 1787 and of the Connecticut convention, had been one of the five members of the committee of detail (the others being Gorham, Wilson, Randolph, and Rutledge), and had paid special attention to taxation. He had been a leader in the first Senate. Wilson, J., is considered to have been one of the most influential members of the convention of 1787 (1 Curtis, Const. Hist. of U. S., 642), and had spoken for the committee of detail upon this subject (5 Ell. Deb., 2 ed., 432). He had also been a leading member of the Pennsylvania convention, and was familiar with the French economists (2 *ibid.* 483). His opinion would have been the most valuable, but was rendered at circuit, and has not been preserved. Paterson, J., had been a prominent member of the convention of 1787. Chase, J., had been one of the leading members of the Maryland convention (2 *ibid.* 549). Chase and Wilson, JJ., had both participated in the debates of the Continental Congress upon the tax question (1 *ibid.* 70, 72, 77; 5 *ibid.* 39-40, 62, 65, 67). Ellsworth, C. J., and Paterson, J., had been members of an early special committee of the convention of 1787 on this subject, and the latter had proposed a plan about it (5 *ibid.* 191-2, 270-3). Iredell, J., had been a member of the North Carolina convention. Ingersoll, for the plaintiff in error, like his opponent Hamilton, had been a member of the convention of 1787.

or was not a direct tax.¹ Of the arguments only a fragment survives, five pages representing a three-hour discussion for defendant in error by Alexander Hamilton, who had acted on the committee of style in 1787, and had recommended the tax under consideration as Secretary of the Treasury. He argued that direct and indirect taxation had no settled legal meanings; that by the test of shiftableness this tax would be part direct and part indirect, which would be absurd; that by the prevailing political economy taxes upon lands are called direct and all others indirect, because "all taxes fall ultimately upon land, and are paid out of its produce, whether laid immediately upon itself, or upon any other thing"; that a rule must be adopted which would not involve "preposterous consequences"; that this tax would in the British statutes be an excise; and that "where so important a distinction in the Constitution is to be realized, it is fair to seek the meanings of terms in the statutory language of that country from which our jurisprudence is derived."² All the judges concurred in holding the tax to be constitutional, although not apportioned; that it was "within the power granted to Congress to lay duties"; and this, among other reasons, because it was not a tax that could be practically apportioned, and because it would be a duty within the definition in Great Britain, "from whence we take our general ideas of taxes, duties, imposts, excises, customs, etc."³

In five cases arising after the civil war the fundamental question was discussed at great length before the Supreme Court, whose then members reached unanimously the conclusion that the principle of this early decision applied to the case of a general income tax upon real and personal property, and that such a tax was therefore to be classified as a duty and levied under the rule of uniformity, and need not be apportioned among the states in

¹ It was in fact a fictitious case. *Hylton* conceded that he kept one hundred and twenty-five chariots exclusively for his own personal use, more than then existed in Virginia, but no more than thought necessary to the jurisdiction of the court.

² Works of Alexander Hamilton, Lodge's ed., vii., 328-33. See (*Euvres de Turgot*, 1844 ed., i., 394, 396, 417. Turgot, then a high authority, thought that there were only three possible forms of taxation; the direct on lands, the direct on persons (capitation tax), and the indirect tax. The latter included the tax on the profits of money or of industry. Adam Smith's work is quoted by the court, but is less likely to have influenced the convention than the writings of Locke and the French economists. It was not reprinted in America till 1789. Smith had his own idea of an indirect tax, not subject to the test of shiftableness (3 Dall. (U. S.), at 180).

³ 3 Dall. (U. S.), at 174, 175, 181.

accordance with their population.¹ In the Scholey case, which related to a succession tax upon real estate, the court stated that an income tax could not be distinguished in principle from a succession tax. In the final Springer case the principle was applied to a general graduated tax upon individual incomes, the minimum income bearing the highest rate of tax under the law then before the court being \$10,000. These cases were elaborately argued, and in deciding the last one the court announced its conclusion "that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate."²

These were war taxes, and had been repealed long before the last of these decisions. A few years after them, however, Congress was faced with a deficit in the treasury which was caused by the recent assumption of expenses that were a legacy of the war.³ The party controlling the House of Representatives, accepting the theory that the prevailing taxes on consumption bore especially hard upon the smaller incomes, undertook to make up the deficit with a compensatory duty upon the larger ones. In order to avoid the constitutional objections that were threatened, the new income tax law was drawn so as to follow closely the lines of the earlier ones, and to come clearly within the decisions that had sustained them; and for this reason proposed improvements in administration were rejected.⁴ The law took effect August 28, 1894. On December 22 the attack upon it began. A bill was filed in the Supreme Court of the District of Columbia to restrain the Commissioner of Internal Revenue from collecting the tax. The case was argued ably and elaborately for the complainant, but dismissed on January 23. It is notable that counsel felt obliged by the previous decisions to

¹ *Pacific Insurance Company v. Soule*, 7 Wall. (U. S.) 433 (1868); *Farmington v. Saunders* (the cotton tax case, affirmed by a divided court without opinion); *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533 (1870); *Scholey v. Rew*, 23 Wall. (U. S.) 331 (1874); *Springer v. United States*, 102 U. S. 586 (1880). The first of these concerned a tax on the total net income of certain classes of corporations. The argument that this included rents and to that extent indirectly reached the land, in the case of corporations which drew part of their income from land, was brought before the court (*Brief of W. O. Bartlett*, cited at 7 Wall. (U. S.) 438).

² 102 U. S., at 602.

³ The deficit for the fiscal year 1894 was \$69,803,260.58, of which \$12,100,208.89 was due to the sugar bounties, which were repealed. The payments under the new Pension Act of 1890 were \$57,900,173.54. The total civil war pension amounted to \$140,000,000.

⁴ Some amendments were made by the Senate introducing large exemptions whose effect was not passed upon by the court.

concede that the law did not impose a direct tax,¹ and to base his attack solely upon the uniformity clause of the Constitution. At about the time of the argument of this case, two more were commenced. These were cases to which neither the United States nor any of its officers were parties. They were stockholders' suits brought in New York against certain trust companies, for the purpose of restraining the latter from paying the new tax upon their incomes.² The theory of the suits was ingenious, but it was believed by the government that it was too fictitious to be entertained by the courts. For the bills did not even aver that the defendants intended to pay the taxes without protest, and as to taxes paid under protest there is a well-settled remedy by action at law against a solvent defendant, so that no irreparable injury can be anticipated. They came up rapidly, however, by means of *pro forma* rulings, thus losing the very important advantage of a rehearsal in a lower court, and were advanced for hearing at an early day; and in the very complex legal, political, and financial situation at the moment, it was not felt advisable by the government, notwithstanding the many disadvantages to which it was put by insufficient notice and by its position as a mere *amicus curiae*, to urge any delay, or any objections which might seem to the public technical, or to do more than perform its duty to the court by calling attention to the fact that these New York suits appeared to it to be moot cases. Meanwhile the case first begun was hurried through the local Court of Appeals³ and was directed to be argued with the other two.⁴ The government rested upon the earlier decisions as to the directness of the tax,⁵ devoting its main attention to the question of uniformity. A singular result ensued. The court decided by a vote of six to two that so much of the duty as included rents and income from real estate was void as a direct tax. It stood equally divided as to whether this invalidated the whole act; as to whether a tax upon income of personal property was

¹ Moore v. Miller, 5 App. D. C. 413, 417. The bill was filed by Shellabarger & Wilson, a firm both of whose members were leaders at the Washington bar, and by Senator Edmunds. After the direct tax point was contested in New York the concession was retracted.

² Hyde v. Continental Trust Co., filed January 11, 1895; Pollock v. Farmers' Loan & Trust Co., filed January 19, 1895.

³ 5 App. D. C., at 434-5.

⁴ There were strong objections to the procedure in this case also. It was never decided, but ultimately dismissed by the appellant (163 U. S. 696).

⁵ Argument of Attorney-General Olney, pp. 4-5.

direct; and as to whether any part of the tax, if not considered as a direct tax, was invalid for want of uniformity. It unanimously held that income from municipal bonds must be excluded. It directed a decree for complainant "in respect only of the voluntary payment of the tax on rents and income of the real estate" and of municipal bonds.¹ The complainants immediately moved for a rehearing on the theory that the rents were inseparable from the rest of the income, that the tax was a unit, and that if the rents could not be included the whole tax was therefore void. The government joined in the request for a rehearing, and upon the oral argument squarely conceded its grounds to be correct. The direct tax question was then for the first time argued on both sides upon its original merits. A full bench attended, although for the ninth judge his attendance was expected by him to be, and proved to be, his death warrant. He sustained the government's contention. Of the two judges whose previous position had been conceded by both sides to be untenable, one now gave full adhesion to the government's position, while the other changed in the contrary direction. The net result was a complete overthrow of the tax by a vote of five to four.²

It is not the plan of this article to comment upon the advisability of a court's reversing its own previous decisions upon a point of political controversy, or upon any of the other subjects which were discussed in the dissenting opinions, and so extensively also in the periodical literature of the time. Something, however, of interest to the profession seems to remain to be said upon three points: whether the direct tax question is an open one; what, if so, are its original merits (for these the four dissenting judges refused to consider); and, if it is desirable that the controversy be ended by a constitutional amendment, what amendment should be made.

So far as the income tax decisions of 1895 may have been based upon any economic definition or reasoning, they have been overruled by the succession tax cases of 1900.³ If the test of shiftable-

¹ *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 586. The separability of the rents was not suggested in the bills of complaint, but was a point raised in the brief and argument. It had never been raised in the litigations over the civil war revenue laws, but on the contrary the tax had been regarded as a unit (*Memphis R. R. Co. v. United States*, 108 U. S. 228, 234).

² 158 U. S. 601.

³ *Knowlton v. Moore*, 178 U. S. 41 (1900). This is true even as to the matter of the municipal bonds. *Murdock v. Ward*, *ibid.* 139. This case, it seems to me, answers the argument based upon the Attorney-General's concession at 158 U. S. 630. If the

ness be the true one, neither form of taxation is less direct than the other. Neither can be shifted by the taxpayer to anybody else.¹ Apart from the element of shiftableness, a succession tax is direct in a much more positive sense than is a general income tax. The latter is a tax upon the net income which the individual received during the next previous year. Part of that income, if not all of it, is gone and spent. Unless the income of the person taxed is derived entirely from investments, and unless there has been no change in those investments, the property from which the tax, if at all, will be collected is not the property whose produce was an element in estimating its amount. Moreover, gross income bears so little proportion to selling value, and from gross income there must be so many deductions in arriving at the amount of a tax on net income, that the amount of such a tax would bear usually no proportion to the valuation of any property owned by the taxpayer, even if the income tax were a tax measured by the sum of the net incomes of the taxpayer's various properties, added to his net earnings; but even this last is not true, for he deducts his outgo by reason of indebtednesses which did not arise from his property and had no relation to it or to his profession. In short, the property from which all or a part of his income for the past year may have been derived is not theoretically or always, even in the case of a man living on his property and earning nothing, either the measure of the tax or the fund out of which it is eventually paid. A succession tax on the other hand is measured by the valuation of certain property at a particular moment, and is collected by impounding that particular property or its proceeds. The federal succession tax was not in theory, like similar taxes laid by the states,² a condition attached to the granting of a privilege; for the privilege of succeeding to the

income tax is a unit, the interest on municipal bonds cannot be traced and deducted. If it is not a unit, it is not a true income tax. The writer was informed that Jackson, J., did not agree with the decision at 157 U. S. 583 as to the municipal bonds, but the point was not argued on the rehearing. He, and others of the judges, did not admit the correctness of the concession that the income tax then before the court was a unit.

¹ This is generally assumed to be the economic test, but was not that of the early economists, and is generally abandoned as valueless by their present-day successors, who recognize no distinction between direct and indirect that could be made the basis of a practical system of taxation. Other unshiftable taxes now laid under the rule of uniformity, and sustained by the Supreme Court, are those on state bank circulation.

² *United States v. Perkins*, 163 U. S. 625; *Matter of Lansing*, 182 N. Y. 238, 248.

property of a decedent is granted by the state, not by the nation. The succession tax was distinguished from the income tax by calling it a duty or excise, laid by the United States upon the exercise of this privilege.¹ Calling a tax an excise, however, does not change its economical definition or its practical operation or its essential nature. The distinction is verbal. But a legal rule which can be avoided by a mere form of words is not really based upon public policy.² Taxes which were admittedly unconstitutional as laid have been in the past sustained by the insertion of such a clause as that the tax, however measured, was upon franchises and not upon property.³ Suppose that a future income tax law, varying perhaps slightly in its substantial provisions except in the absence of deductions from income, should recite that it was laid as a duty or excise upon the past net income as a unit, and should be defended upon the analogy of the excise upon successions and upon corporate franchises, and the court should be faced with the question whether the insubstantial distinction between this new law and the law that was overthrown in 1895, or the other insubstantial distinction between the new law and the succession tax law that was sustained in 1900, should prevail; — the power of the nation to supply its treasury in time of stress depending upon the result. It is easy to perceive that the court would not hastily decide to refuse a consideration of the new law upon the merits.

If the new law were taken up for consideration upon the merits, the first question considered would be the relative weight to be given to the various income tax decisions of the past. The court would be faced with a problem which has never faced it before; namely, whether one series of decisions should be given greater weight because they were unanimous upon the point involved, and because one of them was substantially contemporaneous with the Constitution itself, and was enunciated by men who were witnesses as well as judges as to the meaning of the words used in that instrument, or whether another decision should be given greater weight because it was later in point of time, and was regarded by

¹ 178 U. S., at 83.

² Jessel, M. R., in *Bellairs v. Bellairs*, L. R. 18 Eq. 510, 516.

³ *People v. Home Insurance Co.*, 92 N. Y. 328, affirmed 134 U. S. 594, construing an amendment re-enacting a tax law with insertion of the words "as a tax upon its corporate franchise or business," and following *Hamilton Co. v. Massachusetts*, 6 Wall. (U. S.) 632. See also *Murdock v. Ward*, 178 U. S., at 146-8.

five out of the nine judges then comprising the court as distinguishable from the earlier ones, or as overruling them. On the one hand it will be urged that all of these decisions alike are in the past; that there is no presumption in favor of the correctness of a decision at one time in the past as against a decision at another time in the past; that greater weight is given to contemporaneous construction of an instrument than to the construction of a century later; that a unanimous decision, say thirty years old, is more weighty than the opinion of the odd judge in a divided tribunal fifteen years old; that the conditions surrounding the litigations of 1895 were not those best calculated to produce a correct result; that the prevailing opinions of that year should be given only the weight due to the distinguished jurists who uttered them, and should be treated rather indeed as minority opinions in the general examination of all of the utterances of the court during more than a century upon the general subject. It would be said that our constitutional development should not be arrested, much less put back, by an accident, and that the vote of the odd judge in a five to four decision is but an accident.¹ On the other hand, if it be true that the confidence of the people in the judiciary was weakened in 1895 by an overruling of earlier decisions upon a point of political controversy in a time of political excitement, and that the logical and probable result of such a course would make the Constitution so plastic at all points in the hands of the contemporary judges that each new party in power would feel charged with the duty of providing a court that would sustain its own proposed legislation, then it would be urged that this loosening of the distinction between the legislature and judiciary would become much more imminent if the court, however unwise it may have been at the last occasion, should for a second time reopen a political controversy, even to restore the Constitution as originally defined. The problem is a difficult one, from whichever side it be viewed, one as to which a lawyer would hesitate either to express his own opinion

¹ "A decision made by but five judges against four dissentients, the nine having been selected without the slightest foreknowledge of the problem which is to be submitted to them for solution, is but an accident. Mr. Justice A dies in February instead of March. President B appoints his successor. Had he lived a month longer, President C would have appointed his successor, the case of *Smith v. Jones* would be decided the other way, and the future course of history be changed. We have banished the lottery from ordinary life, but we retain it among the most powerful instruments of legislation." 2 Colum. L. Rev. 79.

or predict that of the court, and one with which lawyers hope that the court will never be faced.

Whether the judges of 1796 were right in declaring a duty upon the use of personal property not to be a direct tax within the meaning of the instrument which they had helped to frame, whether their successors of 1880 were right in holding that a general duty upon net incomes was for the same reason not a direct tax within the meaning of that instrument, is a question which will always be interesting in itself even if it be deprived of practical importance by constitutional amendment, because it is a question of history as well as of law. Indeed the prevailing opinion of 1895, so far as it is not shaken by the later decisions, seems to me to be based upon a purely historical line of reasoning, whose acceptance by the ultimate verdict of historians I think a matter of doubt. Upon matters as to which the Supreme Court of the United States was as nearly as possible equally divided, a confident expression of opinion would be presumptuous in any one, and especially in one who took part in the litigation. His function is rather to call attention to the various phases of the case, and leave others to follow up his suggestions. If the contemporary understanding of the tax clauses of the Constitution comes ever under complete investigation according to the recognized canons of historical criticism, a vast amount of material will be found on file in the income tax cases of 1895; but it will probably not be found complete. Probably no question of such difficulty and importance was ever presented with so little time for preparation. Upon the part of the complainants a considerable number of quotations, favorable to their view, from the controversial writings and private correspondence of the statesmen of the eighteenth century were submitted, and some of this was incorporated into the prevailing opinions. These quotations were as far as possible investigated by the government, but time did not permit of any considerable independent search for such material, although some was added both by the government and by the judges.¹ I think it especially a matter of doubt whether the future critic will agree with the majority of the court as to the relative weight to be given to the various classes of historical evidence considered; and he will claim the right to an independent judgment,

¹ The petition for rehearing was filed April 15. The court set the application for May 6, and then directed that the argument proceed forthwith. The case was decided May 20 (158 U. S. 601, 605-7).

because the ascertainment of an eighteenth century definition is more peculiarly a matter of history than of law. I think that in balancing them against the practical construction given to the Constitution by the Washington and Adams administrations, and against the *Hylton* case, he will give less weight to the fragments of half-reported debate in the state ratifying conventions. Giving them any weight at all is an exception to the rule which excludes even stenographically reported debates upon the passage of a law, because for various reasons they are so apt not to represent the general consensus of opinion in the legislature as to its meaning.¹ Not only is the reporting so unsatisfactory,² but an examination into the details of the Constitution was not primarily the business before these state conventions. They could and did propose amendments, but the main purpose of the men who were most familiar with the Constitution and most interested in procuring its adoption was to get it through the state conventions with as few amendments as possible, and therefore to let sleeping dogs lie. Thus it was intended to give Congress the power to levy stamp duties, but members were desired to say as little as possible on this unpopular subject,³ and if fully reported Ellsworth observed this precaution in his explanation to the Connecticut convention.⁴ The debates in these conventions, so far as reported, were generally on broad lines, and so far as taxation was concerned were occupied with the discussion of the principal taxes with which the minds of the delegates were familiar, without stirring up the question what taxes might conceivably be laid in addition. The same is to be said of such controversial writings as the *Federalist*, which was published for a present purpose, and was not written consciously to be a permanent classic.

In taking up the discussion it is to be borne in mind that we are studying the terminology of the eighteenth century, and must use with caution any definitions framed by courts or text-writers of a century later.⁵ In this connection we must remember that no in-

¹ *Aldridge v. Williams*, 3 How. (U. S.) 9, 24; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 318. The reasons are explained by Story, J., in *Mitchell v. Great Works Milling Co.*, 2 Story (U. S.) 648, 653; Field, J., in *Leese v. Clark*, 20 Cal. 387, 425; *County of Cumberland v. Boyd*, 113 Pa. St., at 57.

² P. 280, *supra*.

³ Luther Martin's Report to the Maryland Legislature (1 Ell. Deb., 2 ed., 368).

⁴ 2 *ibid.* 191-6.

⁵ 158 U. S., at 686, 699. But see pp. 622, 630, 631.

come tax in the present sense of the phrase, that is, no tax on net incomes or even on gross incomes by actual computation, had yet been laid, so that the delegates are not to be presumed to have had it in mind at all. England had only laid a specific duty on salaries and pensions. The colonies and states had, some of them, in assessing all property for purposes of taxation, included the appraised value of one's profession or trade in the assessment list, while the valuation of property was often reached by calculations based upon an estimate of the value of its annual user.¹

It will be noticed in the judicial opinions of 1796, as in the argument of Mr. Hamilton at the bar of the court, that they discussed two different distinctions: first, between direct and indirect taxation; and second, between direct taxes on the one hand, and duties, imposts, or excises on the other. Indirect taxation is not, however, mentioned in the Constitution itself, and nothing in the Constitution requires us to give it a legal definition. The other distinction is the only one to be found in that instrument. The distinction between direct and indirect taxation belongs, or belonged (if it is obsolete), to political economy, not to law. Political economy was then in its infancy. Some statesmen, Hamilton and Wilson as well as Morris, were familiar with the new speculations. But most of the leaders in the convention of 1787 were primarily lawyers, who naturally looked at constitutional language from a lawyer's point of view. These would look first at the colonial and state laws of their own homes, and secondly at those of Great Britain, "whence we take our general ideas of taxes, imposts, excises, customs, etc.,"² and with which they were then, more than their successors are now, familiar. The first would give no definitions upon which all would agree.³ The second would. I think that they meant by taxes those things which in the English statute book were then called taxes, and that they meant by duties those things which in the English statute book were then called duties,⁴ although endeavoring not very successfully to identify the latter class of impositions with those which

¹ 158 U. S., at 701. Seligman, *ut supra*. Probably this is the tax to which Sedgwick was referring in 1794 as "on property and income generally." His colleague Dexter so understood him (157 U. S., at 568).

² P. 283, *supra*.

³ Wolcott, *ut supra*. Seligman, *ut supra*.

⁴ If this view be correct, there was no misunderstanding between Hamilton and the Supreme Court as to the point that he was arguing, as supposed at 158 U. S. 626.

the new science of political economy was then classifying under the head of indirect taxation.¹

In Great Britain the words "tax" and "duty" had had legal definitions for a century, exclusive of each other, settled and unvarying in their statutory use. A tax was laid upon all property, or upon all real property, at a valuation, and always by a rule of apportionment.² The only "tax" in actual use was the general land tax. Everything that was not a tax in this restricted sense was a duty. No duties were laid by any system of apportionment. All were laid by a rule of uniformity. This unvarying distinction in terms in the statute book cannot have been accidental, and must have been familiar to lawyers. Editions of the English statutes were not uncommon in the American law libraries. Pickering's edition came down to 1761 and was printed in 1764 and afterwards continued from that time. This contained the entire text of each act laying a new tax or duty, and contained by title the acts continuing without change the taxes or duties previously levied. The whole subject had been one of great prominence during the years immediately preceding the Revolution, and the act most discussed was the one levying stamp *duties* affecting real as well as personal estate. Our lawyers were then also familiar with the Commentaries of Blackstone, which had been published in 1765 and have been said to have received a wider circulation here than at home. His use of words is careful and accurate. His analysis showed clearly that among duties technically so called were duties upon houses and windows, upon conveyances of land, and upon salaries. I can find no foundation for the contention, sustained in the prevailing opinion of 1895,³ that income taxes have been

¹ I confess to some difficulty in understanding the majority theory in 1895 as to what indirect taxes were a century earlier supposed to be. Stress is laid upon Fisher Ames' remark that an indirect tax falls "not upon the possession but upon the use" (157 U. S. 569; 158 *ibid.* 624, 625), but that sustains the minority view (158 U. S. 665-9, 693, 702). Reference is also made to Adam Smith (157 U. S. 559; 158 U. S. 627), but he also applies the words "direct" and "indirect" rather to the method than the subject of taxation, considering that the same subject may be taxed either directly or indirectly (Wealth of Nations, Rogers' ed., ii., 453). Finally, it is said, what was decided in the Hylton case "was, then, that a tax on carriages was an excise, and, *therefore*, an indirect tax" (158 U. S. 627), although it fell entirely on Hylton if the case stated in the pleadings was correct (p. 283, n. 1, *supra*). This is precisely the theory for which the government contended.

² There was no capitation tax, which therefore had no place in the British classification. This may explain why the committees of detail and style in the convention of 1787 gave it a class by itself.

³ 157 U. S., at 572.

always classed by the law of Great Britain as direct taxes, except the opinions, cited by the court, construing the British North America Act of 1867.¹ These throw no light upon the intent of our statesmen of eighty years before. The earlier English taxes described by Blackstone² were succeeded by the general Act of 1689,³ which was apportioned in 1692 among the different counties, cities, and boroughs, and was continued as an apportioned tax by annual statutes until 1798, when Pitt made the tax perpetual. There was at first some collection of this tax from personalty, but it speedily became a land tax and nothing else.⁴ The apportionment was very unfair from the start,⁵ and the disparity of course grew worse as time went on. It was collected by officials known as the "commissioners of the land tax." The title of the statute after 1703 remained in a substantially unvarying form as follows: "An Act granting an aid to Her Majesty by a land tax to be raised in the year [blank]." When made perpetual in 1798,⁶ it was still referred to as the "land tax." Besides this apportioned tax there was another system of taxation, applicable to real as well as to personal property. This was a system of uniformity, and the imposts were unvaryingly called duties. Thus we have in 1696 the "Act for granting to His Majesty several *rates or duties* upon houses for making good the deficiency of the clipped money."⁷ Pickering's Abstract of 1764 says of this: "Duties to be charged on inhabitants. Commissioners for the land *tax* 7 & 8 W. III, c. 5 to execute this for the first year." We still have the same terminology in the statute of 1765, "for repealing the several *duties* upon houses, windows, and lights," etc.;⁸ a statute which established a uniform duty on dwelling-houses in England of three shillings, and in Scotland of one shilling, with a graduated scale of duties on windows or lights. In three statutes the house duties were classed with the "duties upon coal, culm, and cynders."⁹ The famous Stamp Act of 1765 did not purport to lay a tax at all, but a "stamp *duty*."¹⁰ What has sometimes been called the first income tax law was the statute of the elder Pitt of 1758 "for grant-

¹ 158 U. S., at 631.

² 1 Bl. Com. 308-12.

³ 1 Wm. & M., c. 20.

⁴ 1 Dowell, Hist. of Taxation in Eng., 51-3.

⁵ *Ibid.*, 109.

⁶ 38 Geo. III, c. 5.

⁷ 7 & 8 W. III, c. 18. As to the phrase "rates or duties," cf. an act of 1794, *supra*, p. 282.

⁸ 6 Geo. III, c. 38.

⁹ 8 Anne, c. 4; 3 Geo. I, c. 8; 5 Geo. I, c. 19.

¹⁰ 5 Geo. III, c. 12.

ing to His Majesty several *rates and duties* upon offices and pensions, upon houses, upon windows or lights," etc.¹ This statute consistently referred to its own exactions as "duties," although it referred to "the last assessment of the land *tax*," that is, the assessment of 1692, and confided its execution to "the commissioners of the land *tax*."² The first general income tax law was the younger Pitt's famous statute of 1799,³ three years after the Hylton case. This also levied "rates and duties" upon incomes, whether they "shall arise from lands, tenements, or hereditaments" or "from any kind of personal property or other property whatever or from any profession," etc.

One of the things that is peculiarly striking about these clauses of the Constitution is the small amount of discussion which they apparently provoked at the time, a feature which would seem to indicate both a general recognition of the meaning of the terms used, and that that meaning was one which led to results satisfactory to all. The only uniformity of meaning, as has been just stated, is to be found in the British statute book. If the words were used in that meaning, the general acquiescence in the result would be at once explained. It would show that the delegates did not worry about whether a tax on any particular subject of taxation would be regarded as a direct tax or a duty, because the Constitution was not understood to be binding the nation beforehand in any particular as to the selection. The evil feared was a combination of seven states, perhaps the seven small ones, to over-assess the property, or lay discriminating duties upon the products, of the other six. The remedy was to prevent any apportionment of taxes otherwise than by the rule of population, and to prevent any levying of duties by a rule which should differ between one state and another. It would show a common understanding, tacitly assumed by everybody, that direct taxes must necessarily, *ex vi termini*, be laid by some rule of apportionment, so that the only question was what the rule of apportionment should be; while duties, imposts, and excises must as necessarily be levied without apportionment, so that the only question was whether they should be uniform throughout the United States, or whether Congress should be allowed to levy special duties in particular localities.

¹ 31 Geo. II, c. 22.

² See also Mr. Pitt's Consolidated Fund Act of 1787, 27 Geo. III, c. 13.

³ 39 Geo. III, c. 13.

In other words, the former would be the general property taxes laid according to a general valuation, while the latter would include those on specific property, together with stamp duties, license duties, business duties, and duties on salaries and pensions. Taxes invented in the future (and the general income tax is one of these) would be left to be classified in the future.

Apportioned taxes have turned out a failure. They are difficult enough to assess within the limits of a state, and under control of a state board of equalization. They have been tried by the nation,¹ and each trial was a failure. The last direct tax levied was paid back again.² There will probably never be another. Whatever taxes are levied in the future will be levied under the rule of uniformity. If we are to amend the Constitution, a matter now so often discussed, we should not try to tinker it by introducing a specific exception to a broken down general rule. Amendments to the Constitution should conform to its main plan. They should be drawn on broad lines, and not introduce a multitude of special cases.³ If the apportionment clause is to be touched at all, it is as easy to repeal it altogether. If there are any taxes that ought to be left to the states (and a general tax upon all property at a valuation, a tax which necessarily involves an apportionment in order to avoid variations in the rate of assessment, is one of these), the constitutional amendment should distinctly specify them and simply state that the nation is not to levy them. All taxation not forbidden should be permitted, and it should all be uniform throughout the land.

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¹ 157 U. S., at 572-3.

² Act of March 2, 1891, c. 496.

³ See Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. (U. S.), at 407.

THE RIGHT OF BAILEES TO CONTRACT
AGAINST LIABILITY FOR NEGLIGENCE.

BETWEEN the law of bailments as it stands today and as it stood at the ancient common law is fixed a wide and remarkable gulf, whose broad expanse is bridged only by the ever-increasing influence through the centuries of the law of contracts. The object of this article is to trace the progress of the law of bailments through the past and to study its present status, for the purpose of prophesying its probable future and discovering the direction it ought to take.

In the earliest English law there is some question whether the liability of bailees, including common carriers and others pursuing common callings, was that of insurance, or simply that of responsibility for negligence. Justice Holmes maintains that the liability of all bailees was that of insurance, and that the present so-called common law liability of common carriers and innkeepers is a fragmentary survival of the earlier law in regard to all bailees. Professor Beale defends the theory that at first bailees in general were liable only for negligence, and that the special liability of common carriers as insurers was established not even by the case of *Coggs v. Bernard*,¹ but by the case of *Forward v. Pittard*.² A middle theory holds that, according to the early law of England, all bailees pursuing a common calling were liable for some particular loss as insurers, but only common carriers were absolute insurers, and then not until the time of Lord Holt and Lord Mansfield; that all bailees were liable in trespass and detinue (and therefore *quasi* insurers) when they had a cause of action over against the wrongdoer; that after the origin of the writ of trespass on the case bailees were also liable where they had undertaken to do something (*assumpsit*) and were guilty of misfeasance; and that later, through the confusion of the growing principles of contract with the old principles of tort they were liable for a mere omission as well. But, whatever theory be adopted, it is certain that some time in the history of the common law, by custom and public policy,

¹ 2 Ld. Raym. 908.

² 1 T. R. 27.

all bailees became liable both for positive acts of misfeasance (negligence?) and for strict neglects, and that some exceptional bailees were made absolute insurers except for the acts of God and the public enemy.¹

These common law doctrines, as found in their advanced form, were inherited by the commonwealths of the United States.²

We start, then, with this common law liability of bailees, — a liability imposed by the sound public policy of the ages, for this it was which created the duty on the part of those who received property belonging to others to keep it with diligence and return it or deliver it over at the end of the bailment. Independently of the agreement of the parties the law indicated where men should not be negligent. This marked the climax in the development of the principles of tort law so far as the subject of bailments is concerned. To use the language of evolution, it was the perfection of a species. From that time the law worked along another line, for the development of the species of contract in bailments. While in early English history, therefore, bailments was regarded as a tort subject and the duties of the relation were created by law independently of the agreement of the parties, it was soon realized that *assumpsit* was not the legitimate field of torts. The subject of contracts was made distinct and characteristic by the successive actions of debt, covenant, and *assumpsit*, and further and further invaded the territory of bailments and carriers, until now it is natural to ask whether there is longer left in bailments and carriers any law of torts. Yes, it has not been supplanted. Its application is sometimes simply co-ordinate with that of contracts, sometimes still exclusive of contracts; but always, in the absence of agreement, there continues to rest upon the bailees of the different classes the general duty, created by the common law, to exercise slight, ordinary, or high diligence, or to insure, as the

¹ Holmes, *The Common Law*, 164-205; 11 HARV. L. REV. 158-168; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Doorman v. Jenkins*, 2 Ad. & El. 256; *Schiells v. Blackburne*, 1 H. Blk. 158; *Vaughan v. Menlove*, 3 Bing. N. C. 468; *Handford v. Palmer*, 2 Brod. & Bing. 359; *Searle v. Laverick*, L. R. 9 Q. B. 122; *Calye's Case*, 8 Coke 32; *Forward v. Pittard*, 1 T. R. 27; *Story, Bailments*, § 332.

² *Tracy v. Wood*, 3 Mason (U. S.) 132; *Eldridge v. Hill*, 97 U. S. 92; *Preston v. Prather*, 137 U. S. 604; *Spooner v. Mattoon*, 40 Vt. 300; *Thompkins v. Saltmarsh*, 14 Serg. & R. (Pa.) 275; *Wood v. McClure*, 7 Ind. 155; *Commercial Bank v. Martin*, 1 La. Ann. 344; *Stewart v. Western, etc., Co.*, 4 Biss. (U. S.) 362; *Cutler v. Bonney*, 30 Mich. 259; *Black v. Chicago, etc., Co.*, 30 Neb. 197; *McPadden v. Central, etc., Co.*, 44 N. Y. 478.

case may be. So that, ordinarily, a bailor may elect to sue in either tort or contract. This is right. It registers the common opinion as to the diligence such parties ought to exercise, and where they have not particularized as to the diligence they desire, it prevents the parties from escaping from all diligence. Every man owes a duty to every other not intentionally, or negligently, to injure him.¹

But a more difficult question concerns us here. Granting that, in the absence of particular agreement, the tort duties still survive, if the parties so desire; can and should they be allowed by contract to lay aside all these tort duties and themselves determine just what their duties, rights, and liabilities to each other shall be?

Answering the first half of the question, so far as English law is concerned, although there are very few cases involving gratuitous and ordinary bailees, and the difficulty of tracing the development of the freedom of contract is consequently enhanced, yet there is no difficulty in knowing what the final outgrowth of the development has been. All liability for negligence may be excused. To that extent the parties may make any terms they desire.²

In the United States the history of the growth of the power of contract, like that of all other branches of the law, reveals a condition of strange perplexity. Every possible holding here finds an exponent, a champion. While, as in England, most of the instances of contract encroachments occur in connection with the exceptional bailments, doubtless because of the greater anxiety to get away from the more stringent common law liability there, yet the few existing cases on the unexceptional bailments cannot be styled harmonious. Almost unanimously it is held that bailees may increase the duty which they would otherwise be under, but to what extent they may decrease that duty is not clear. However, if the expression "gross negligence" be understood to include only wilful acts, probably a majority of the courts in the United States hold that the parties to the bailments under consideration may substitute for the common law any liability they may agree upon, except to excuse fraud, or wilful wrongdoing, or to violate any positive prohibitions of law. This would allow them to stipulate against liability for negligence in any degree.³

¹ Holmes, *The Common Law*; Pollock & Maitland, *Hist. of Eng. Law*; Bigelow, *Torts*; *State v. Chew Muck You*, 20 Ore. 215.

² *Walter v. Railroad*, 2 E. & B. 750; *Van Toll v. Railroad*, 12 C. B. (N. S.) 75.

³ *Lee v. Baldwin*, 10 Ga. 208; *Marks v. New Orleans Cold Storage Co.*, 107 La.

This doctrine is squarely held by New York, but the other courts which have passed upon the question have said they would not permit exemptions from liability for "gross negligence." Yet, in spite of the fact that literally negligence is negative and should exclude the idea of wilfulness, from the way the various tribunals have employed the words "gross negligence" and the general thought running throughout the context where they are found, it seems as though they had in mind some overt act of wilfulness, or bad faith, or fraud. Otherwise all distinction between the different bailments would inevitably be abolished. How could there be any justification for allowing borrowers, pledgees, and hirers of the different classes to narrow their obligations so as to be liable only for gross negligence, and not allowing depositaries and mandataries to change their liability in any particular? There is none. The courts could not have meant to announce such a principle. The different degrees of diligence, "high," "ordinary," and "slight," are simply the degrees of diligence which the ordinary prudent man would exercise if he were a bailee of that particular class, and any failure to exercise that is negligence. Hence it is submitted that the courts do not intend sometimes to uphold a contract against negligence and at other times not; that negligence in this connection is not capable of division; and that what the courts mean by their exception is wilful, wanton, reckless, or criminal acts, which they call "gross negligence," though strictly not negligence at all. If this is their true meaning, these decisions in our country are in harmony with the English and continental holdings. If it is not their meaning, the statement above as to the weight of authority in the United States is not correct.¹

But, whatever uncertainty there may be as to the actual position of the courts, there is no uncertainty in the mind of the writer as

172; *Conway Bank v. Am. Ex. Co.*, 8 Allen (Mass.) 516; *Smith v. Library Board*, 58 Minn. 108; *Gashweiler v. Wabash, etc., Co.*, 83 Mo. 112; *Wells v. Porter*, 169 Mo. 252; *Kinney v. Central Railroad*, 32 N. J. L. 407; *Dale v. Lee*, 51 N. J. L. 678; *Alexander v. Greene*, 3 Hill (N. Y.) 9, 7 Hill (N. Y.) 533; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Wells v. Steam. Nav. Co.*, 8 N. Y. 375; *Moeran v. New York, etc., Co.*, 59 N. Y. Supp. 584; *Nat. Cash Reg. v. Callais*, 84 N. Y. Supp. 166. *Contra*, *Lancaster v. Smith*, 62 Pa. St. 47. See also *Memphis, etc., Co. v. Jones*, 39 Tenn. 517; *Direct Nav. Co. v. Davidson*, 74 S. W. Rep. 790; *Kimball v. Rutland, etc., Co.*, 26 Vt. 247; *Story, Bailments*, §§ 19, 22, 31, 32, 66, 182a, 238; *Lawson, Bailments*, § 13; *Schouler, Bailments and Carriers*, § 20; *Hutchinson, Carriers*, §§ 14, 40.

¹ *Omaha, etc., Co. v. Chollette*, 33 Neb. 143; *Stringer v. Alabama, etc., Co.*, 99 Ala. 397; *Kentucky, etc., Co. v. Gastineau*, 83 Ky. 119; *Louisville v. Filbern*, 6 Bush (Ky.) 574.

to what ought to be their position. Progress among men has ever been from status to contract. It is the common judgment of mankind that it is best for the individual and the race to have freedom of contract indulged so far as possible. Therefore I maintain that, on general principles, parties should be allowed freedom of contract here, and thus contract for exemption from liability for negligence if they desire. Of course, if there is any rule of public policy that would be violated, this should not be allowed. But is there any rule of public policy which would object to contracts of this kind by ordinary bailees, — that is, those pursuing avocations not affected with a public use or interest? The duties and obligations of these bailments cannot be thrown upon the bailees without their consent, and this being so, if they do consent to assume the duties, why should they not have the right to determine the nature of the same in every respect, and their responsibility for neglect thereof? It is true that such a contract might be a bad one for one of the parties, but so any contract that may be made is liable to be. Public policy does not yet forbid bad bargains. On the other hand, does it not seem like a harsh rule which, in addition to the gratuitous care of property, will make a depositary and mandatary liable for even gross negligence in spite of the stipulation of the parties? For the moment we will consider only the question of contracting against negligence, not including wilful and wanton acts, but using the term in its appropriate sense, in the words of Mr. Cooley, "the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." Public policy forbids only such contracts as are opposed to the public will, or tend to subvert the public welfare, like those tending to immorality, or to deprive the public of the services of citizens, or to influence the public service, or to interfere with public justice. A contract of the kind under consideration bears no resemblance to any of these. It has no tendency to be injurious to the public, or against the public good; nor would any principle of public welfare or morality be infringed. It would seem as though there could be but one answer to a question of this sort, and that is that public policy makes no objection whatever, as found in either legislation or common law, for the contract is concerned only with the property rights of the individuals to the contract. Public policy is in its nature uncertain and incapable of being defined with exactness; and where the contract

is not prohibited by constitution or statute the extension of the principle should be carefully guarded.¹

So much for the contract aspect of the subject. Let us now look at its tort aspect. Here the argument from analogy is equally strong, for so far as the allowance of exemptions from liability is concerned the principles of the tort of negligence ought not to be different from those of other comparable torts. In other torts, it is well established, consent is always a good defense to an action. More than this, consent is even sometimes a defense to criminal prosecution. This is on the principle that that to which a person consents is not esteemed in law an injury. *Volenti non fit injuria*.

In a suit, or indictment, for false imprisonment, if it can be shown that the act was done with the consent of the party complaining, that is a complete bar to all proceedings.² In an action for slander, or libel, all that the defendant need show by way of defense is consent to publication; even an agreement to accept an apology is sufficient.³ The principle was well established at the common law that a tenant could protect himself against an action for waste by a contract "without impeachment of waste."⁴ To an action of trespass, acquiescence, special contract, or leave and license, was always such justification as to defeat recovery.⁵ In the same way consent is a complete defense to a suit for conversion,⁶ or nuisance,⁷ or an assault and battery, unless the latter amounts to an injury to the public as well as to the individual, as in case of breach of the peace, when public policy renders the consent illegal.⁸

Likewise, in the English and some American courts, it has been held that by an express contract, or an implied one, a servant may release his master from all liability to the servant, where statutes

¹ Egerton v. Brownland, 4 H. L. Cas. 1; Printing, etc., Co. v. Sampson, L. R. 19 Eq. 462, 465; Teal v. Walker, 111 U. S. 242; United States v. Trans-Missouri, etc., Co., 70 Fed. Rep. 201; Peterson v. Christiansen, 26 Minn. 377; Houlton v. Nichol, 93 Wis. 393.

² Floyd v. State, 12 Ark. 43; Berry v. Adamson, 6 B. & C. 528; Ellis v. Cleveland, 54 Vt. 437.

³ Lane v. Applegate, 1 Stark. N. P. 97; Boosey v. Wood, 3 H. & C. 484; Schouppflin v. Coffey, 162 N. Y. 12.

⁴ Garth v. Cotton, 1 Ves. 524; Bowles' Case, 11 Coke 82 b.

⁵ Low v. Nettles, 2 Bailey (S. C.) 447; Windle v. Crescent, etc., Co., 186 Pa. St. 224; Lambert v. Robinson, 162 Mass. 34.

⁶ Powell v. Hoyland, L. R. 6 Exch. 67; Powers v. Klenzie, 15 Mont. 177.

⁷ Burkam v. Ohio, etc., Co., 122 Ind. 344; Woodward v. Seeley, 11 Ill. 157; White v. Manhattan, etc., Co., 139 N. Y. 19.

⁸ State v. Beck, 1 Hill (N. Y.) 363; O'Brien v. Cunard, etc., Co., 154 Mass. 272.

have not expressly forbidden it; although, if public policy were ever going to speak, it ought to be here, because of the interest which the state has in the servant as a citizen, who ought to be guarded from danger. But such a contract may be made either before the employment begins, or afterwards, or after the injury, if based upon sufficient consideration.¹

If consent is allowed to destroy a person's cause of action in all the foregoing torts, why not in the case of the tort of negligence? And if consent will destroy the tort liability, where is the logic for the objection to a contract destroying, modifying, or supplanting that tort liability?

It should be noted at this point that in the illustrations herein-before referred to the consent and the contracts have affected only the parties thereto. The moment they affect third parties public policy steps in and declares them illegal, so that any contract to get a person to commit any of the torts enumerated would be void, whether the tort was negligence, or assault, or battery, or slander, or libel, or waste, or false imprisonment, or malicious prosecution, or conversion, or nuisance, or trespass. An agreement which contemplates a civil wrong to a third person is illegal.²

In conclusion, then, it is my judgment that in the bailments of deposit, mandate, commodatum, pledges and pawns, and the ordinary hirings, all the bailees should be allowed to exempt themselves from liability for negligence, whether it be called "slight," "ordinary," or "gross," unless prohibited by special statutory enactments, provided that is the plain meaning of the contract; and as to exemption from liability for other acts than those which are negligent, the general principles of torts, as indicated above, should be applied. However, up to the present time, all that we can say is that the cases in New York, England, and some other foreign countries, where the civil law has more influence, have gone as far as this. But the great majority of the holdings in this country lean in this direction, and the law of bailments has not yet reached its final form; so that, judging by the direction of its change and progress in the past, it may be prophesied that some time in the future it will be allowed to bailees of these classes to make as broad

¹ *Otis v. Penn. Co.*, 71 Fed. Rep. 136; *Western, etc., Co. v. Bishop*, 50 Ga. 465; *Fulton, etc., Co. v. Wilson*, 89 Ga. 318; *Purdy v. Rome*, 125 N. Y. 209; 20 Am. & Eng. Enc. 156.

² *Scott v. Brown*, L. R. 2 Q. B. 724; *Woodstock, etc., Co. v. Extension, etc., Co.*, 129 U. S. 643; *W. Va. Trans. Co. v. Pipe-Line Co.*, 22 W. Va. 600.

contracts as those referred to above, and to limit their common law liability of tort on the same principles as all other tort-feasors.

When we come to common carriers, innkeepers, and other bailees affected with a public interest, a different question confronts us. In regard to these two considerations may enter. One is the fact that a public interest may be involved. These occupations and enterprises may involve the safety of the lives of the citizens of the state, reasonableness of rates, unjust discriminations, and other matters affecting the general public in addition to the private parties who may make the contract. The other consideration follows from this. Because of these public interests the public has a right to control and regulate the businesses and to restrict the freedom of contract. In other words, public policy applies here as it did not in the other bailments. In guarding these public interests, in England and in this country from the time of its earliest colonization, it has been the immemorial law that the public has a right to regulate stage lines, ferries, hackmen, railways, wharfingers, auctioneers, innkeepers, bakers, millers, and the like, and in so doing to fix a maximum charge for services rendered, accommodations furnished, and articles sold, although as to some of them the public had conferred no franchise. This law of the ages has been reaffirmed and recognized by the Supreme Court of the United States.¹ With especial force should this right be applied to those monopolies which have the breath of life breathed into them by legislative act and have vested in them the power of eminent domain to take private property for their use, which under our Constitution must be for a public purpose. But the right of the public to regulate is not restricted to these enterprises, but applies to all affected with a public use. Under this principle the right of regulation has been invoked against water companies, cotton presses, general warehouses, street railways, canals, ferries, toll roads and bridges, wharves, telephones, telegraphs, gas companies, tolls of mills, salvage of logs, etc.²

This makes a great distinction between bailees whose business is

¹ *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 516.

² *Spring Valley v. Schottler*, 110 U. S. 347; *Delaware v. Stockyards*, 45 N. J. Eq. 50; *Buffalo, etc., Co. v. Buffalo*, 111 N. Y. 132; *Perrine v. Canal Co.*, 9 How. (U. S.) 172; *Parker v. Railroad*, 109 Mass. 506; *Covington v. Sanford*, 164 U. S. 578; *Ouacheta v. Aiken*, 121 U. S. 444; *Mayo v. Tel. Co.*, 112 N. C. 343; *Toledo v. Gas Co.*, 5 Oh. St. 557; *State v. Edwards*, 86 Me. 102; *West Branch v. Fisher*, 150 Pa. St. 475; 31 Am. L. Rev. 655.

affected with a public interest and those whose business is not thus affected. Where in the one case it might not be against public policy to permit contracts to exempt them from liability for negligence, in the other case it might be directly opposed to public policy. Where in the one case public policy would favor the principle of freedom of contract, in the other case it would be opposed to that principle for the reason that the public is a third party to all such contracts and has interests therein which must be protected. Bearing this distinction in mind, let us proceed to consider the question whether these exceptional bailees should be allowed to limit their liability for negligence. If the interests of the public could be as fully protected and safeguarded in this way as any other, I suppose all will admit that the best rule would be that permitting such bailees as great freedom of contract as other bailees. What rule, then, will best conserve the interests of the public?

The true reason for the extraordinary common law liability of common carriers and innkeepers for the safety of goods was the possibility of collusion, of combining with thieves against those trusting them. In the early days of the law this was a very great possibility and probability, but at the present time the reason has ceased to exist. The reason for the rule having fallen, should not the rule itself fall? This argument may have force as applied to innkeepers, but, owing to the nature of the business of common carriers, it is perhaps to be admitted that as to them there are new reasons for the extraordinary liability, as now modified, which are as strong as the old reason.¹

The course of the law of innkeepers has been much the same as that of other bailees. After a period of development their extraordinary liability for the goods of a guest and their ordinary negligence liability for the safety of the person of the guest were established as their common law liability. From the time of the establishment of this rule the tendency of the law has been toward breaking it down by permitting limitations on it. But in this process, while some of the changes have been wrought out by the allowance of notices and special contracts of the parties, most of the limitations have been those resulting from statutory enactments. By analogy it is reasonable to suppose that at least as extensive contract limitations would be allowed to innkeepers as have

¹ Story, *Bailments*, §§ 464-467; 11 HARV. L. REV. 158; 30 AM. L. REV. 767.

been allowed to common carriers (their common law liability being less). But, ordinarily by statute, they can escape liability for goods by posting notices only when the goods have not been deposited with them for custody as required by the notices.¹

The Roman law made livery-stable keepers insurers and classed them with innkeepers and carriers, but the English law has refused to apply the doctrines to livery-stablers; nor are warehousemen, or other bailees affected with a public interest, insurers. Only innkeepers and common carriers are made approximately insurers. But whatever reasons for this liability exist today, they apply with the same force to these other public bailees as to innkeepers, and it would seem as though the rule ought to be relaxed in the one case or made more rigid in the other.

The history of the right of common carriers to contract against liability for negligence discloses a strange variety of holdings, both in the case of common carriers of goods and of passengers, for the similarity of principles and the fact that the same parties are generally engaged in both occupations sanction their treatment together. In general, as in the bailments heretofore considered, there has been an ever-increasing tendency, more marked here than in any other bailment, to allow special contracts to take the place of the common law liability. Little by little there has been a gradual breaking away from the harsh common law principle which made common carriers insurers except for the acts of God and the public enemy. Their common law liability itself has been lessened by the admission of other exceptions to it, where the loss resulted from the inherent nature of the goods or live stock, public authority and act of the shipper. But special contract exemptions have worn still further into the common law liability. In this manner common carriers have been allowed to determine the time of delivery of goods and the route of transportation, to exempt themselves from loss by fire, breakage, leakage, etc., when not due to their neglect, to limit the time to present claims and the amount recoverable in case of loss, to impose conditions and restrictions

¹ Dawson *v.* Chamney, 5 Ad. & El. 164; Richmond *v.* Smith, 8 B. & C. 9; Pinkerton *v.* Woodward, 33 Cal. 557; Bodwell *v.* Bragg & Bro., 29 Ia. 232; Berkshire *v.* Proctor *et al.*, 7 Cush. (Mass.) 417; Fuller *v.* Coates *et al.*, 18 Oh. St. 343; McDaniels *v.* Robinson, 26 Vt. 316; Story, Bailments, § 486; Rev. Stat. of Ill. 1903, c. 71, § 2; Rev. Stat. of Me. 1903, c. 29, § 7; Comp. L. of Mich. 1897, §§ 5315, 5316; Rev. Stat. of Mass. 1902, 862, 863; Rev. Stat. of Minn. 1905, § 2810; Rev. Stat. of N. Y. 1901, 1744, 1746.

on passengers, and in a word to do anything that did not excuse negligence, until at last even the question of permitting them to contract against responsibility for the results of their negligence has arisen. On the rock of this question the courts have split asunder.¹

So far as English common carriers are concerned, early glimmers of the right to establish by contract the liability they should be under are found as far back as Southcote's case,² where it was hinted that such a carrier might have provided against liability. In *Morse v. Slue*³ it was said he "might have made a caution." In later cases it was held that by a notice brought home a common carrier could create a special acceptance, which, except for misfeasance, would control his liability in every respect. By the Land Carriers' Act of 1830 this notice feature was practically abolished, but the rule was still recognized that by a special contract the carrier could stipulate against liability for any loss, where there was no wilful wrongdoing, whether it related to goods or passengers, and whether it was caused by his negligence or not. The Railway and Canal Traffic Act was then passed, and by this it was provided that any agreement limiting a carrier's liability must be signed by the shipper and be adjudged by a court to be just and reasonable; but if these conditions are met a common carrier may make a contract which will excuse him from liability for all negligence, though not for wilful wrong.⁴

Hence it is seen that, by the law of England, common carriers, like all other bailees, may by contract do away with all of their common law liability except that which may be called their pure tort liability for positive wrongdoing.

The English rules are followed in Canada, Scotland, Germany, Italy, and in some of the states in our own country.⁵

¹ *Hart v. Pennsylvania*, 112 U. S. 331; *Liverpool v. Phenix*, 129 U. S. 397; *Express Co. v. Caldwell*, 21 Wall. (U. S.) 264; *Boylon v. Hot Springs*, 132 U. S. 146; *Louisville v. Sherrod*, 84 Ala. 178; *Duntley v. Railroad*, 66 N. H. 263; *Graves v. Lake Shore*, 137 Mass. 33; *O'Malley v. Great Northern*, 86 Minn. 380; *U. S. Express v. Backman*, 28 Oh. St. 144; *Richmond v. Payne*, 86 Va. 481.

² 4 Co. 84.

³ 1 Vent. 238.

⁴ *Gibbon v. Paynton*, 4 Burr. 2298; *Forward v. Pittard*, 1 T. R. 27; *Nicholdson v. Willan*, 5 East 507; *Smith v. Horne*, 8 Taunt. 144; *Chippendale v. Lancashire*, 12 L. J. C. B. 22; *Manchester v. Brown*, 8 App. Cas. 70; *Hinton v. Dibbin*, 2 Q. B. 646; *McCawley v. Furness*, L. R. 8 Q. B. 57; *Blake v. Great Western*, 31 L. J. Exch. 346.

⁵ *The Glengoil, etc., Co. v. Pilkerton*, 28 Can. Sup. Ct. 146; *Bicknell v. Grand Trunk*, 26 Ont. App. 431; *Henderson v. Stevenson*, L. R. 2 H. L. 470.

The extreme holding in the United States is that permitting the absolute change and extinguishment of the common law liability by contract, if the parties so desire and agree. This view is taken practically only by the jurisdiction of New York. In that state the pendulum has swung to both extremes. At first it was held that a common carrier could not by contract or otherwise evade the duty thrown upon it by the common law; but after a period of development and expressions of opinion by the federal Supreme Court the courts of the State of New York swung back to enforce any contract the parties might see fit to make, provided the language of the contract is plain and distinct, though by his wilful wrongdoing the carrier may render himself liable for breach of contract.¹

The theory of the New York court is that the contract between the shipper or passenger, on the one side, and the carrier, on the other, is purely a private one, with which the public has no concern, and that public policy is satisfied by holding the carrier bound to carry under his common law obligation if the shipper or passenger insists upon it and will pay the regular freight or passenger rate.

Next in liberality are some holdings exempting the carrier from liability for negligence to one riding on a free pass, or to an express messenger, or sleeping-car agents, — the entering wedge for the free pass decisions, so far as the United States Supreme Court is concerned, having been driven in the express messenger cases.² This rule, of course, refers to only a part of the carrier service.

The next most liberal holding, followed by some courts, is that permitting the common carrier by contract to provide against all liability, except for injury occasioned by fraud or gross negligence, whether to goods or passengers, provided there is a reduction in the freight or passenger rate to constitute a consideration for the agreement; and it is a question whether with these decisions should

¹ Gould *v.* Hill, 2 Hill (N. Y.) 623; Nelson *v.* Hudson, etc., Co., 48 N. Y. 498; Keeney *v.* Grand Trunk, etc., Co., 47 N. Y. 525; Cragin *et al.* *v.* New York Central, 51 N. Y. 61; Gleadell *v.* Thomson *et al.*, 56 N. Y. 194; Bissell *v.* New York, etc., Co., 25 N. Y. 442; Ulrich *v.* Railroad, 108 N. Y. 80.

² Baltimore *v.* Voight, 176 U. S. 498; Northern Pacific, etc., Co. *v.* Adams, 192 U. S. 440; Griswold *v.* New York, etc., Co., 53 Conn. 371; Blank *v.* Illinois, 182 Ill. 332; Rogers *v.* Kennebec, etc., Co., 86 Me. 261; Quimby *v.* Boston, etc., Co., 150 Mass. 265; Bates *v.* Old Colony, etc., Co., 147 Mass. 255; Brewer *v.* New York, etc., Co., 124 N. Y. 59; Muldoon *v.* Seattle, 10 Wash. 311; Russell *v.* Pittsburg, etc., Co., 157 Ind. 305; 6 Cyc. 579.

not also be placed those permitting exemptions from liability to persons riding on free passes.¹

The New Jersey decisions, though to be classed here, allow common carriers to contract against the negligence of their agents and servants but not against their own negligence, a position demolished as long ago as the case of *Railroad v. Lockwood*, *supra*, where the court pointed out that a common carrier is an artificial being which can act only through agents and servants, and if it should be allowed to relieve itself from the negligence of one class of servants it should from the negligence of others. Such reasoning is on a par with the recently advanced argument by analogy that the state should proceed against the property of a corporation, instead of trying to hold its officers personally liable, for analogy would require that, instead of being tied up and held idle, the property be made to produce something for the state, as criminals are made to do.²

In the cases which sustain the foregoing gross negligence exception, there arises again the question of the meaning of the term. If the courts really mean negligence, the epithet is technically a misnomer; if they mean acts which would constitute some other tort, that is another matter entirely. If the latter interpretation were adopted, all the cases thus far considered could be harmonized and placed in one and the same category, namely, the cases allowing exemptions from negligence of all kinds, all except gross negligence and all in the cases of express messengers, sleeping-car agents, and persons riding on free passes. If this interpretation is not correct, and I hardly think it would be acceptable to the courts which have used the language, the cases cannot be harmonized. The confusion here is analogous to that discovered in the unexceptional bailments.

But, even though the cases permitting these contracts against negligence could be harmonized, aside from the free pass doctrine, the great majority of the courts in this country, up to this time, have declared against the right of common carriers to make con-

¹ *Northern Pacific, etc., Co. v. Adams*, 192 U. S. 440; *Boering v. Railway, etc., Co.*, 193 U. S. 442; *Cooper v. Raleigh, etc., Co.*, 110 Ga. 659; *The Southern Express v. Barnes*, 36 Ga. 532; *Illinois Central v. Read*, 37 Ill. 484; *Toledo, etc., Co. v. Biggs*, 85 Ill. 80; *Wabash, etc., Co. v. Browne*, 152 Ill. 484; *Higgins v. New Orleans, etc., Co.*, 28 La. Ann. 133; *Wilson v. Shulkin*, 51 N. C. 375; *Muer v. Chicago, etc., Co.*, 5 S. D. 568; *Amas, etc., Co. v. Railroad, etc., Co.*, 67 Wis. 46; *Black v. Goodrich*, 55 Wis. 319.

² *Kinney et al. v. Central Railroad*, 32 N. J. L. 407.

tracts exempting themselves from liability for negligence, in any degree, whether in the carriage of goods or of passengers.¹ It is true that a majority of our courts support the right of common carriers to limit their liability to parties riding on free passes, either absolutely or except for gross negligence; but there is some opposition to this doctrine, in either view, manifesting itself in Alabama, Iowa, Minnesota, Missouri, Pennsylvania, and Texas, sometimes on common law grounds, sometimes in statutory enactments, and the free pass cases anyway can be differentiated, made an exception, and upheld on the ground that public policy would discourage the issuance of such passes.²

The reasons given for the majority holding are, in the carriage of goods, (1) the inequality in the position of the contracting parties. The carrier enjoys a *quasi* monopoly, and though the shipper can always insist upon the common law liability or avoid an unfair contract if procured through duress or fraud, yet his remedy is so vexatious and tedious that in the long run the carrier would gain the advantage and be able to set the public at defiance. (2) These companies are in the nature of quasi-public institutions, discharging some of the sovereign functions which appropriately belong to the state, and therefore they owe a duty to the public which they cannot avoid by private contract any more than other public officials. In the carriage of passengers the reason for the rule of the majority is the interest which the state, as *parens patriæ*, has in the life and health of its citizens.

We have admitted that if it were a purely private matter between the shipper or passenger and carrier, as the New York courts maintain, absolute freedom of contract would be the best rule. Granting the public interest, it may be urged in favor of freedom

¹ *Railroad v. Lockwood*, 84 U. S. 357; *N. J. Steam. Co. v. Mer. Bank*, 6 How. (U. S.) 344; *York Co. v. Central Railroad*, 3 Wall. (U. S.) 107; *Baltimore v. McLaughlin*, 73 Fed. Rep. 519; *The South, etc., Co. v. Henlein et al.*, 52 Ala. 606; *California, etc., Co. v. Railroad, etc., Co.*, 113 Cal. 329; *Camp v. The Hartford, etc., Co.*, 43 Conn. 333; *Rose v. The Des Moines, etc., Co.*, 39 Ia. 246; *Kallam v. U. S. Express*, 3 Kan. 198; *McCoy v. Erie*, 42 Md. 498; *Illinois, etc., Co. v. Crudup*, 63 Miss. 291; *Hull v. Railroad*, 41 Minn. 510; *Graham & Co. v. Davis & Co.*, 4 Oh. St. 362; *Piedmont, etc., Co. v. Railroad*, 19 S. C. 353; *Franham v. The Camden, etc., Co.*, 55 Pa. St. 53; *Railroad v. Gilbert et al.*, 88 Tenn. 430; *So. Kan., etc., Co. v. Burgess*, 90 S. W. Rep. 189; *Virginia, etc., Co. v. Sayers*, 26 Gratt. (Va.) 328.

² *Mobile v. Hopkins*, 41 Ala. 486; *Rose v. Des Moines, etc., Co.*, 39 Ia. 246; *Jacobus v. St. Paul, etc., Co.*, 20 Minn. 125; *Starr v. Great Northern, etc., Co.*, 67 Minn. 18; *Bryan v. Missouri, etc., Co.*, 32 Mo. Ap. 228; *Camden v. Bausch*, 7 Atl. Rep. 731; *Gulf v. McGowan*, 65 Tex. 640.

of contract to relax and modify the strict rule of responsibility that it would enable carriers to reduce their rates of compensation (surely a public benefit), and if this did not lead to the introduction of new evils, against which it is the policy of the law to guard, it is of course an end to be sought.¹ But the danger of leading in other serious evils is very great, wellnigh inevitable. The condition of our carrier service is bad enough under existing conditions; a relaxation of liability which would tend to make it more careless, more unobliging, more dangerous, would be intolerable. Again, it may be claimed, a common carrier ought not to be made an insurer without the rights of an insurer; that the only resemblance his business bears to the insurance business is his liability; and that it seems especially harsh and unjustifiable to hold the common carrier liable for the frauds perpetrated on the consignor by third parties.² The answer to this objection is that, if it is necessary to protect the interests of the public, the public, without other reason, has a right to impose even such a liability as a condition to the exercise of the carrier's franchise.

In view of all these considerations and of the methods by which at the present time common carriers must carry on their business, it seems to me it is against public policy to allow a common carrier to contract away its liability for negligence either in the carriage of goods or of passengers; but that public policy would not prohibit such contracts, clearly, in the case of the simple bailments not affected with a public interest, nor even in the case of innkeepers and other bailees affected with a public interest. The cases and legislation supporting these propositions have the better reasoning. However, in the instance of common carriers, it must be admitted, as should be expected, the tendency of the law seems to be slowly the other way, towards the allowance of special contracts. Express messengers and persons riding on free passes may now make such contracts, a great many courts allow still further latitude, and in the future progress of the law the doctrine may encroach into the territory of passengers for hire and the territory of goods and live stock. But it does not seem as though the time were yet ripe for such changes, and haste in this direction should be made slowly. Before the clamor of private convenience is listened to it should be certainly and definitely decided that the interests of the public are

¹ *Railroad v. Lockwood*, 17 Wall. (U. S.) 357.

² 9 Alb. L. J. 301.

safeguarded. The effect of letting the bars of public policy down and the freedom of contract in, where that policy has been tried, has not proven an unquestioned and indisputable success. The legislation in England registers the protest of the English people against the interpretations of the courts. Dissatisfaction is felt in New York. It is not alone the fact that common carriers are pursuing a public employment that should prevent their making contracts limiting their liability for negligence, — there are other public employments perfectly compatible with absolute limitations of such liability; — it is more because of the magnitude of the business, its monopolistic character, and the conditions and dangers surrounding its management.

The bridge, which we saw stretching ahead of us at the beginning, we have now crossed, and I think I have indicated where, with the widening of the gulf, it is destined, or at least ought, to be extended.

Hugh Evander Willis.

UNIVERSITY OF MINNESOTA.

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THE article by Professor Smith, begun in this number, is the first of a series on various topics to be contributed this spring by members of the faculty of the School in tribute to the memory of Professor Langdell. These articles, together with the appreciations in the November issue, may later be published in the form of a memorial volume.

STATE INHERITANCE TAX ON STOCK OF SIMULTANEOUSLY INCORPORATED TWO-STATE CORPORATIONS. — Confusion has arisen in the application to choses in action of the provision of the New York transfer tax imposing an inheritance tax on "property within the state" belonging to a non-resident decedent.¹ Adopting the sound view that as to choses in action without physical situs and not peculiarly the creature of a particular sovereignty only the state of the creditor's domicile has jurisdiction to regulate succession at his death, New York courts first applied this provision only to negotiable or quasi-negotiable instruments actually deposited within the state,² to shares in domestic corporations,³ to New York judgments,⁴ and, anomalously but excusably, to money deposited in New York banks.⁵ More recently, following revolutionary dicta of the United States Supreme Court,⁶ they have extended its application to all choses in action running from New York citizens except those deemed inseparable from the paper evidencing them.⁷ The hardship of double taxation in another state has not deterred them.⁸ Policies of domestic life insurance companies alone seem exempt,⁹ but the court of last resort has yet to pass upon this anomaly.

¹ N. Y. L. 1887, c. 713.

² *Matter of Morgan*, 150 N. Y. 35.

³ *Matter of Bronson*, 150 N. Y. 1.

⁴ *Matter of Smith*, 14 N. Y. Misc. 169.

⁵ *Matter of Houdayer*, 150 N. Y. 37.

⁶ See *Blackstone v. Miller*, 188 U. S. 189, where Holmes, J., extends to taxation the doctrine that jurisdiction over the debtor is sufficient for garnishment. See *Chicago, etc., Ry. v. Sturm*, 174 U. S. 710. The court finds justification for this in the aid given by the debtor's state in collecting the claim. But cannot the creditor sue elsewhere? May he not have collateral security? See 15 HARV. L. REV. 680.

⁷ *Matter of Clinch*, 180 N. Y. 300; *Matter of Hewitt*, 181 N. Y. 547; *Matter of Daly*, 100 N. Y. App. Div. 373, affirmed 182 N. Y. 524.

⁸ *Matter of Gordon*, 114 N. Y. App. Div. 202.

On top of these decisions, including as "property within the state" almost everything up to successively defined constitutional limits, comes a holding by the Court of Appeals in the other direction. *Matter of Cooley*, 186 N. Y. 220. A Connecticut decedent left shares in a railroad which had been simultaneously incorporated in New York and Massachusetts, and which owned approximately five-sixths of its property in the latter state. New York tax officials, arguing from the well-established doctrine that for purposes of federal jurisdiction for diversity of citizenship such a simultaneously incorporated two-state corporation may be regarded as a citizen of either state,⁹ disregarded the Massachusetts incorporation and assessed the shares at their full market value. When it is considered that a corporation is not a "citizen" at all,¹⁰ that to circumvent this difficulty a bald fiction has been invented of conclusively presuming all stockholders citizens of the state of incorporation,¹¹ that this fiction leads to the absurdity of conclusively presuming stockholders of simultaneously incorporated two-state corporations citizens of two states, that it will not be applied to subsequent incorporation in a second state,¹² and finally that the purpose of the fiction was to achieve what seemed a beneficent end, the doctrine seems a weak legal basis for deducing an inequitable result. Some unfortunate results of such an assessment were recently well pointed out.¹³ For example, should a Californian die leaving Lake Shore stock to a collateral relative, the bequest would be subject to a tax of 15 per cent in California besides similar taxes in six other states and possibly before long to a federal tax. The Court of Appeals believed that the New York legislature intended no such legacy-grabbing, and therefore directed that the shares be valued according to such proportion of the entire property as lay within the taxing state. It is quite competent for courts to construe non-mandatory tax acts in an equitable way, and wise for them to refuse to follow the drift of former interpretation when confronted with inequitable results of alarming difference in degree. Specific authority for such equitable construction is found in the cases of a capital-stock property tax¹⁴ and of an organization tax¹⁵ on simultaneously incorporated two-state corporations. The court takes pains to distinguish the case of a one-state corporation owning property as a foreign corporation in another state,¹⁶ and to exclude from the operation of its rule cases of incorporation in bad faith. As the first authoritative determination of a question of great and increasing importance, it establishes an enlightened precedent which other states are likely to follow.

The unconsidered problem of the constitutionality of the discarded rule is important. A property tax on such lines would certainly be unconstitutional because of the lack of corresponding governmental protection and as therefore a taking without due process of law.¹⁶ But for a privilege conferred a state may exact what it please. The right of succession is not a natural right, but a privilege which the law may altogether withhold or grant

⁹ *Mo. Pac. Ry. v. Meeh*, 69 Fed. Rep. 753; *Wasley v. Chicago, etc., Ry.*, 147 Fed. Rep. 608.

¹⁰ *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Beale, Foreign Corp.*, § 79.

¹¹ *St. Louis, etc., Ry. v. James*, 161 U. S. 545.

¹² "The Inheritance Tax Colossus," *Boston Transcript*, December 8, 1906.

¹³ *State v. Metz*, 32 N. J. L. 199.

¹⁴ *People v. N. Y., C., & St. L. Ry.*, 129 N. Y. 474.

¹⁵ *Matter of Palmer*, 183 N. Y. 238.

¹⁶ *D. L. & W. Ry. v. Pa.*, 198 U. S. 341; *Union Transit Co. v. Ky.*, 199 U. S. 194.

upon arbitrary conditions.¹⁷ Or, if we regard this tax as on the privilege of succeeding to the decedent's membership in a New York entity, it is equally a privilege tax. The legislature may prescribe any mode of measurement of the price of its privilege. A 5 per cent tax upon a total valuation cannot be more obnoxious than a 30 per cent tax upon a one-sixth valuation. Moreover, in view of federal tolerance of state inheritance taxes on bequests to the United States¹⁸ and bequests of United States bonds,¹⁹ the question of unconstitutional burdening of interstate commerce seems scarcely arguable.

REVOCATION OF JOINT WILLS. — Joint wills, as regards the extent to which the law will enforce them, may be divided into three classes: *a*, joint wills of joint or separate property with no time stated as to when they shall take effect; *b*, joint wills of joint property, or separate property treated as joint, to take effect at the death of the survivor; *c*, joint reciprocal wills in which each testator provides that when he dies his property shall go to his co-testator, and sometimes after his death to an ultimate beneficiary. Through these three classes there runs a dividing line separating those in which a contractual relation is involved from those in which it is not.

Because of the nature of a will, in that it can take effect as to only the testator's property and only at his death, a will can never be really joint in the same sense as a contract. From this fact sprang the antipathy of early courts to joint wills, and the tendency of modern courts, following the intention of the parties, to treat them as separate wills by each testator. By the older theory joint wills, like joint contracts, were considered irrevocable by one party alone because of their joint quality, and therefore the decisions held that, since wills were necessarily revocable, these joint instruments could not be wills.¹ These difficulties have been obviated by the newer theory, which, wherever possible, regards the instrument as joint only in the manner of execution, but revocable by either party as to his share and admissible to probate on the death of either party as his will. This view is not found possible in the instruments of class *b*, and since they cannot be effectuated they are generally held void.² The wills of class *a* it is almost always possible to regard as separable, and they are accordingly revocable by either testator, without notice, either before or after the death of his co-testator.³ In the case of class *c* it has been held that the will may be revoked by either testator as to his share, during the lives of both,⁴ although notice is usually required so that the other testator may withdraw his will also.⁵ Even after the death of one testator and the acceptance by the other of the benefits under the decedent's will, the survivor has been allowed to revoke his will and shut out the ultimate residuary legatee of both wills.⁶

¹⁷ *Magoun v. Ill. Trust & Savings Bank*, 170 U. S. 283. But see *Nunnemacher v. State*, 108 N. W. Rep. 627 (Wis.).

¹⁸ *United States v. Perkins*, 163 U. S. 625.

¹⁹ *Plummer v. Coler*, 173 U. S. 115. See *Beale, Foreign Corp.*, § 763.

¹ See *Hobson v. Blackburn*, 1 Add. Eccl. 274; *Clayton v. Liverman*, 2 Dev. & B. (N. C.) 558.

² *State Bank v. Bliss*, 67 Conn. 317; *Hershy v. Clark*, 35 Ark. 17; *Dennyson v. Glostert*, L. R. 4 P. C. 236.

³ See *Hill v. Harding*, 92 Ky. 76, 80; *Matter of Raupp*, 10 N. Y. Misc. 300; *Betts v. Harper*, 39 Oh. St. 639.

⁴ *Schumaker v. Schmidt*, 44 Ala. 454.

⁵ See *Ex parte Day*, 1 Bradf. Sur. (N. Y.) 476.

⁶ *Cawley's Estate*, 136 Pa. St. 628.

These results seem inevitable in the case of group *c*, unless we adopt the view that a joint will presumptively implies a contract to keep the will unrevoked.⁷

Turning to joint wills where a contractual relation is involved, it would seem as a matter of fact that a contract to keep the will unrevoked may well be inferred in all cases of joint reciprocal wills unless something to show a contrary intention appears. Unlike the agreement to make a will, this contract should be susceptible of breach by a revocation of the will during the lives of the parties. There are, however, several dicta, following an early English case on this point, to the effect that, even where a contract may be implied, the will is revocable as to his share by either testator, giving notice to the co-testator.⁸ Yet if one revoked without notice and died, clearly equity would enforce the agreement against his estate.⁹ Or if one testator died and the other accepted the benefits of the will, the agreement should be enforced against the survivor like a promise for good consideration to make a will. Though equity here as always would be loath to declare a revoking will void, yet, in case of a breach as by a fraudulent conveyance by the survivor, it might, during his life, at the instance of the beneficiaries impress upon his property the liability to answer for the contract.¹⁰ At any rate, after the death of the survivor who has accepted the benefits of the co-testator's will and then revoked his part of the will, equity according to a recent decision will give the beneficiaries under the original will a remedy against voluntary transferees of the survivor's property to the extent of their interest under the will. *Bower v. Daniel*, 95 S. W. Rep. 347 (Mo., Sup. Ct.). It follows, of course, that they would have a remedy against his estate in the nature of specific performance.¹¹ Similarly, instruments like that in class *a*, when the circumstances show they were made in accordance with a contract, should be enforceable in the same manner as the joint reciprocal wills chiefly discussed.

OSTER OF MUNICIPAL OFFICERS. — A constitutional or statutory enactment that any public officer shall fulfill certain requirements cannot be overriden even by popular vote. This is true when a condition precedent is demanded,¹ — for example, that the officer must be twenty-one years of age, — or when specified acts of misconduct in office are declared to work a forfeiture of the term.² In the former case the person elected in disregard of the condition becomes at most a *de facto* officer; while in the latter, if guilty of the forbidden acts, he continues to be a *de jure* officer until removed. In both cases the province of the courts in *quo warranto* is merely to determine a question of fact, — whether there has been a compliance with the legislative requirements.

A more difficult question grows out of the second class of cases, when,

⁷ See *Dufour v. Pereira*, 1 Dick. 419; *Clayton v. Liverman*, 2 Dev. & B. (N. C.) 558, 563.

⁸ See *Dufour v. Pereira*, *supra*; *Edson v. Parsons*, 155 N. Y. 555, 566; *Duval v. Duval*, 54 N. J. Eq. 581, 588.

⁹ See *Edson v. Parsons*, 85 Hun (N. Y.) 263.

¹⁰ *Dufour v. Pereira*, *supra*; *Carmichael v. Carmichael*, 72 Mich. 76. See *Duval v. Duval*, *supra*.

¹¹ *Cf. Bolman v. Overall*, 80 Ala. 451.

¹ *Spear v. Robinson*, 29 Me. 531; *State ex rel. Staes v. Gastinel*, 20 La. Ann. 114.

² *People ex rel. Atty-Gen. v. Heaton*, 77 N. C. 18.

after the court having found grounds for forfeiture has pronounced judgment of ouster, the ousted officer is re-elected to the same office. If the re-election is to a subsequent term, the wrongful acts for which he was previously expelled cannot be made the basis for a second removal. Indeed, though it would seem that re-election should be no condonation, the weight of authority is that wrongful acts, though not resulting in removal, committed in a previous term can never thereafter be a ground for removal.³ The effect, after judgment of ouster, of a re-election to the same term has recently been squarely presented for the first time. *State v. Rose*, 86 Pac. Rep. 296 (Kan.). The holding here was that, at all events, if the ouster expressly excluded the defendant for the remainder of the two-year term, any assumption of the duties of the office under the new election was a contempt of court. The theory of the court was that the two-year term was an entity, and that once the entity had been adjudged forfeit and had been wrested from the incumbent, nothing could restore it. The fallacy in this view seems to be that it overlooked the fact that any election is but a conferring of authority for a stated period, subject to defeasance if certain conditions subsequent happen. In the case at hand, the original authority was cut short by the court; but in doing this the court had exhausted its power. It had not been given the further right to disqualify.⁴ The whole conception of a two-year term as necessarily a unit is artificial, though doubtless useful in many cases. A re-election during its continuance, though popularly said to be "to fill the unexpired term," is, after all, to fill a new term, which happens to have the same farther limit as the old. A term is thus really a tenure, and though the old tenure be ended by the ouster, there is nothing to prevent a new conferring of authority upon the same individual. The old term, to be sure, may be dead; but on its death a new one arises. The reasoning of the court would lead to the result that as we must look at the object — the office — rather than at the subject — the office-holder, — the former is, when taken from the latter, utterly gone, not only as against him, but as against the whole world, until the term comes to its appointed end. The court could properly do no more than oust the officer for what he had done, relying on the good sense of the voters not to re-elect him.⁵ The attempt to do more, being an abridgment of the people's right of free choice, was beyond the power of the court; and the officer could not be in contempt for disobeying the invalid order. Indeed, it may be said that strictly he was not disobedient at all, since it was not the old term which he entered upon, but an entirely new thing. The result reached by the case is eminently desirable; but it should rather be achieved by the legislature, which alone has the power to annex a penalty of disqualification for misfeasance by municipal officers.⁶

INTERRUPTION OF THE ADVERSE ENJOYMENT OF EASEMENTS. — It is commonly said that the adverse enjoyment of easements which begets title

³ *Speed v. Common Council of Detroit*, 98 Mich. 360. But see *State v. Welsh*, 109 Ia. 19.

⁴ See *State ex rel. Tyrrell v. Common Council of Jersey City*, 25 N. J. L. 536, where *mandamus* was granted to compel a common council which had expelled the relator to take him back after an election to fill the vacancy.

⁵ *State ex rel. Tyrrell v. Common Council of Jersey City*, *supra*.

⁶ *Cf. State ex rel. Childs v. Dart*, 57 Minn. 261, on which the Kansas court relies. That was a case of reappointment, but the same rule should apply.

must be "continuous" and "uninterrupted"; yet little difference appears in the use of the two terms by text-writers.¹ Indeed, if applied to the adverse possession of land, the only distinction between them may well be that the one connotes a user not voluntarily, the other not involuntarily, broken.² But when applied to the adverse enjoyment of incorporeal hereditaments, especially easements, the idea that non-acquiescence, affirmatively proved, rebuts the entirely fictitious legal presumption of a lost grant necessary for title by prescription,³ seems to have given "uninterrupted" an entirely distinct meaning.⁴ Adverse enjoyment is "continuous" if, in fact, exercised throughout a period of time; it is "uninterrupted" if the person whose rights are infringed has in no sufficient manner asserted the wrongness of the use. The one requirement prescribes the character of the use itself; the other concerns the attitude, position, or actions of the injured person. This conception of an interruption as any act legally proving non-acquiescence in the wrongful use seems to furnish the key to the decisions both upon what acts constitute interruptions and upon who can interrupt. All jurisdictions would probably agree that acts physically obstructing the adverse use⁵ or suits successfully prosecuted to judgments⁶ are valid interruptions; and many courts hold the mere institution of suit,⁷ or even verbal denials of right or prohibitions of the user,⁸ sufficient. The position of the latter courts is evidently tenable only upon the theory that an "interruption," in essence, is a protest against a wrongful use; for mere words in no real sense break the continuity of adverse user. The difference in decision is due, then, merely to a natural difference in opinion as to what acts public policy demands as proper methods of showing non-acquiescence in the adverse enjoyment.

The true nature of an interruption, however, is perhaps best tested by considering who can interrupt. Under the distinction above taken, although the requisite "continuity" may be lacking either because the adverse user has been voluntarily abandoned or because it has been prevented for some considerable time by any person or event whatsoever, yet an "interruption" can be made only by the person in violation of whose rights the user is exercised. Accordingly it has been held that a stranger cannot interrupt.⁹ Similarly this principle seems to furnish the solution of an apparently more perplexing case. A suit brought by a tenant for years for infringement of an easement appurtenant was held not to interrupt the running of the prescriptive period against the owner of the fee. *Goldstrom v. Interborough, etc., Co.*, 36 N. Y. L. J. 489 (N. Y., App. Div., Nov., 1906). It will be borne in mind that both at common law¹⁰ and by the express provisions of the New York code¹¹ the owner of the particular estate and the owner of

¹ See Gale, Easements, 7 ed., 165, 205; Washburn, Easements and Servitudes, 4 ed., 167-170. Cf. Goddard, Easements, 6 ed., 262.

² See Washburn, Real Prop., 6 ed., §§ 1970, 1971. Cf. Goddard, Easements, *supra*.

³ See Tracy v. Atherton, 36 Vt. 503.

⁴ Alta, etc., Co. v. Hancock, 85 Cal. 219. See also Workman v. Curran, 89 Pa. St. 226, 230.

⁵ Brayden v. New York, etc., Co., 172 Mass. 225.

⁶ Harmon v. Carter, 59 S. W. Rep. 656 (Tenn.).

⁷ Workman v. Curran, *supra*.

⁸ Chicago, etc., Co. v. Hoag, 90 Ill. 339. *Contra*, Lehigh, etc., Co. v. McFarlan, 43 N. J. L. 605.

⁹ McIntire v. Talbot, 62 Me. 312.

¹⁰ Jesser v. Gifford, 4 Burr. 2141. See also Angell, Adverse Enjoyment, 60-62.

¹¹ N. Y. Code of Civil Procedure, § 1665.

the future estate in land have immediate and co-existent rights of action for infringements of the easements appurtenant, if damage has already been done thereby to each estate; and that under the New York decisions such damage has occurred in cases like the present, where the easement is impaired by an apparently permanent structure built after the creation of the particular estate.¹² From the application to these premises of the doctrine of "interruption" herein advocated, the recent decision obviously follows; for, as the tenant's inaction cannot affect the landlord's rights,¹³ so, conversely, his objection to the infringement of his own right can in no way show non-acquiescence by the landlord in the impairment of the latter's co-existent but independent right to have the same easement undisturbed. In England, however, the Prescription Act¹⁴ seems to have so altered the common law conception of an "interruption"¹⁵ that thereunder even a stranger may interrupt,¹⁶ and a tenant's interruption would consequently conduce to the benefit of the landlord.¹⁷

ATTACHMENT OF ROLLING STOCK AND GARNISHMENT OF CARRIERS IN RELATION TO INTERSTATE COMMERCE. — If a state law amounts to a regulation of interstate commerce, and certainly if this regulation is contrary to the intent of Congress express or implied, the law is unconstitutional.¹ Under this principle a state law was recently held invalid in so far as it authorized the attachment of the rolling stock of a non-resident carrier and the garnishment of connecting carriers owing freight collections to the non-resident carrier. *Davis v. Cleveland, etc., Ry. Co.*, 146 Fed. Rep. 403 (Circ. Ct., N. D. Ia., W. D.). The cars attached were in the hands of the garnishees under the usual agreement to forward them to the destination of the freight and return them later to the owner. The court followed the only other cases which have considered the attachment law in relation to interstate commerce.² With one exception,³ these cases do not expressly suggest that a domestic attachment of cars running on their own line would be unconstitutional though the cars were engaged in interstate business. They jump to a consideration of the extra burden upon the defendant of meeting a suit in a foreign jurisdiction, and the burden upon the garnisheed connecting carriers, with consequent discouraging effect upon the forwarding agreement, finding that the whole proceeding is contrary to the intent of Congress expressed in the statute⁴ authorizing carriers in different states to arrange for continuous carriage.

This reasoning proceeds upon an infirm distinction. The line should be drawn not between the attachment of the cars of a resident or non-resident carrier, but between an attachment which directly prevents the delivery of in-

¹² See *Thompson v. Manhattan Ry. Co.*, 130 N. Y. 360. See also, *Storms v. Manhattan Ry. Co.*, 178 N. Y. 493, and cases cited.

¹³ See Angell, *Adverse Enjoyment*, 46-60.

¹⁴ 2 & 3 Wm. IV, c. 71.

¹⁵ See Goddard, *Easements*, 6 ed., 266-270.

¹⁶ *Davies v. Williams*, 16 Q. B. 546.

¹⁷ See *Clayton v. Corby*, 2 G. & D. 174, 182.

¹ See *Cooley v. The Board of Wardens*, 12 How. (U. S.) 299.

² See *Michigan Central Ry. Co. v. Chicago, etc., Ry. Co.*, 1 Ill. App. 399; *Wall v. N. & W. R. R. Co.*, 52 W. Va. 485; *Connery v. Quincy, etc., Ry. Co.*, 92 Minn. 20.

³ See *Wall v. N. & W. R. R.*, *supra*.

⁴ U. S. Rev. Stat. § 5258.

terstate freight in the cars and one which does not. The garnishment certainly, and the attachment in so far as it does not tie up interstate freight, do not amount to regulations of interstate commerce at all. Their real and proper purpose is to secure the payment of debts, and they affect only indirectly interstate commerce. In this respect they are like a law taxing rolling stock,⁶ which is not considered a regulation of interstate commerce when a domestic interstate carrier is taxed, and does not become so, by reason of the indirect effect upon forwarding agreements, when cars which have gained a situs in another state are taxed there.

But an attachment, whether of cars of a resident or non-resident carrier, which directly stops the delivery of interstate freight is very different. Though aimed to secure debts, it has a direct effect upon articles of interstate commerce not connected with the debt. In that way it is as objectionable as a law which, to exclude diseased cattle from a state, orders all cattle excluded,⁶ or one which, to restrict pauper immigrants, orders all immigrants taxed.⁷ An attachment of this nature may be said to regulate interstate commerce. Moreover, as a regulation, it is clearly contrary to the intent of Congress; for it would either greatly delay or cause the trans-shipment of interstate freight, — just those inconveniences which the federal statute authorizing arrangements for continuous carriage⁴ was passed to avoid. It is curious that the cases of domestic attachment have not noticed the possibility that it, as well as foreign attachment, may often affect interstate commerce.⁸ An analogy for the difference between an attachment which directly ties up interstate freight and one which does not may perhaps be found in cases which hold that there may be a valid attachment of a mail boat while the mail is not on board;⁹ but not of a mail wagon which is in actual use.¹⁰

DUE PROCESS OF LAW IN THE COLLECTION OF TAXES. — Tax assessments and collections are seldom made by the regular courts, but by bodies deriving their power from variously framed statutes. As a general rule, due process of law in this connection has only two requirements, aside from the general requirement of jurisdiction: there must be notice of some sort, and there must be a right to a hearing at some stage of the proceedings and before a body capable of giving relief. Other things are matters of procedure. But this rule is open to exception in one class of cases, where the tax is assessed by mere calculation not involving discretion or judgment, as for example a sewer tax assessed according to the area of the land,¹ or a poll tax or license.² Whether the statute which establishes the tax, or some other statute on ordinance, provides for notice and hearing for the correction of errors, is not material. Either affords due process.³ The notice may be merely constructive,⁴ not personal, and the hearing need not be

⁶ See 20 HARV. L. REV. 138.

⁶ See *Railroad Co. v. Husen*, 95 U. S. 465.

⁷ See *Henderson v. Mayor of New York*, 92 U. S. 259.

⁸ See *Boston, etc., R. R. Co. v. Gilmore*, 37 N. H. 410.

⁹ *Parker v. Porter*, 6 La. 169.

¹⁰ *Harmon v. Moore*, 59 Me. 428.

¹ *Gillette v. City of Denver*, 21 Fed. Rep. 822.

² See *Hagar v. Reclamation Dist.*, 111 U. S. 701, 709.

³ *Spencer v. Merchant*, 125 U. S. 345; *Hodge v. Muscatine Co.*, 196 U. S. 276.

⁴ *Bells Gap Ry. v. Pennsylvania*, 134 U. S. 232.

before a court,⁵ nor need a right to an appeal and rehearing be given.⁶ But such notice and hearing must be given as of right and not by favor.⁷

When the tax can be collected only by legal proceedings, requiring judicial notice and permitting a hearing as to the merits, there is clearly due process of law.⁸ Again, everything necessary is afforded when the statutes expressly allow a suit to enjoin the collection of the taxes, upon the trial of which suit their validity and amount can be questioned.⁹ But this ought to be subject to the qualification that there must be constructive notice of some sort given a reasonable time before distraint. In a recent case the Supreme Court has given another application of what is to be considered due process. *Security Trust & Safety Vault Co. v. City of Lexington*, U. S. Sup. Ct., Dec. 3, 1906. In this case none of the previously mentioned methods of hearing was provided for by any statute, but the state courts held that the taxpayer was entitled to a hearing on the merits in a suit to enjoin collection of the taxes, and gave such a hearing. The Supreme Court denied the plaintiff's contention that thereafter the enforcement of the taxes was without due process of law. The result accords with the general interpretation of the clause by the Supreme Court, and formulates a doctrine that a state may thus afford the due process required by the Amendment, regard being had to the above-mentioned qualification as to notice. The holding of the state court seems to have amounted to a construction of the taxing statute in view of constitutional restrictions.¹⁰ But it is highly probable that if in this case the original suit to enjoin had been brought in a federal court, it would have succeeded. Injunctions have been frequently granted where notice and hearing were not specifically provided for in any of the foregoing ways.¹¹

It is apparently now settled that federal courts will not take the view that due process is lacking because of any hardship or inequality in the method of taxation.¹² The case of *Norwood v. Baker*¹³ to the contrary has been so limited that little, if any, ground is now left for its supposed doctrine.¹⁴ Nor will the federal courts construe the Amendment to justify a review of alleged errors in individual instances made by state courts in administering the admittedly due process, if correctly enforced, which the state has provided.¹⁵

THE CRIMINAL LIABILITY OF CORPORATIONS. — The belief long obtained that since a corporation is only a fictitious person created and invested with certain functions by the state, it was capable of doing only acts expressly permitted in its charter; that anything further, being *ultra vires*, was not the act of the corporation; and hence that there could be no corporate

⁵ *Merchants Bank v. Pennsylvania*, 167 U. S. 461.

⁶ *Andrews v. Swartz*, 156 U. S. 272.

⁷ *Stuart v. Palmer*, 74 N. Y. 183.

⁸ *Kentucky Ry. Tax Cases*, 115 U. S. 321; *Hagar v. Reclamation District*, *supra*.

⁹ *Oskamp v. Lewis*, 103 Fed. Rep. 906.

¹⁰ See *Paulsen v. Portland*, 149 U. S. 30; *Rawlins v. Georgia*, 201 U. S. 638.

¹¹ *Albany Bank v. Maher*, 9 Fed. Rep. 884; *Scott v. Toledo*, 36 Fed. Rep. 385.

¹² *Walston v. Nevin*, 128 U. S. 578.

¹³ 172 U. S. 269.

¹⁴ See *French v. Barber Asphalt Co.*, 181 U. S. 324. See also 14 HARV. L. REV. 1-19; 15 *ibid.* 307.

¹⁵ *Arrowsmith v. Harmoning*, 118 U. S. 194. See 1 HARV. L. REV. 314-326.

liability for torts or crimes.¹ But as corporate activities increased, public policy demanded that wrongs should go no longer without remedy, so that it is now everywhere settled that *ultra vires* is not a defense to civil actions.² The established rules of agency apply as soon as the difficulty of *ultra vires* is removed: by the doctrine of *respondeat superior* a corporation becomes liable civilly for even the malicious acts of its officers and other agents, if done in the discharge of their official duty or in the scope of their employment.³ Thus it has been held that a corporation may be liable for deceit, fraud, libel,⁴ conspiracy,⁵ malicious prosecution,⁶ and other torts where wrongful motive is the gist of the action. Indeed, a corporation is so far treated as a natural person that exemplary damages are allowed just as against an individual, provided the wrongful act is authorized or ratified.⁷

The difficulty is in determining to what extent the analogy of civil liability shall be applied to crimes. As might be expected, the early decisions holding that corporations are incapable of committing any crime have been greatly modified by the more modern view of the nature and responsibilities of a corporation, on the ground that society should be protected from the wrongful acts of increasingly powerful corporate persons. It was soon felt reasonable to punish by fine for the criminal neglect of officers or agents. Later the distinction between non-feasances and misfeasances was obliterated. Corporate business is necessarily transacted through agents, and if the corporation, as principal, is held criminally liable for the omissions of its agents, there seems good reason to punish it also for their affirmative acts. But in the decisions which first took this step there were strong dicta that corporate criminal liability extended only to those misfeasances the simple doing of which was prohibited regardless of motive, intending thereby to exclude all crimes in which *mens rea* is essential.⁸ The distinct tendency of modern decisions, however, is to widen the scope of liability. Following the reasoning of the courts in civil suits, it has been held that a corporation may be indicted for libel⁹ and fined for contempt.¹⁰ Recently a federal court has decided that a corporation may be guilty of a criminal conspiracy under the Sherman Anti-Trust Act.¹¹ *United States v. MacAndrews and Forbes Co.*, 36 N. Y. L. J. 815 (Circ. Ct., S. D. N. Y., Dec., 1906). If a corporation may be sued for malicious prosecution and punitive damages recovered, it seems justifiable to punish by fine an injury to the public.¹² It is as easy to impute malice from the agent to the corporation in a criminal case as in a civil suit. It would seem, then, that a corporation may be charged with any crime that can be committed through an agent, and which is done by its officers or agents within the scope of their authority. Of course punishment can be inflicted only when fines may be imposed.

¹ See *Orr v. Bank of United States*, 1 Oh. 28.

² *Nat. Bank v. Graham*, 100 U. S. 699, 702.

³ See *Stewart v. Wright*, 147 Fed. Rep. 321, 327, and cases there cited.

⁴ *Philadelphia, etc., R. R. Co. v. Quigley*, 21 How. (U. S.) 202.

⁵ *Buffalo Oil Co. v. Standard Oil Co.*, 106 N. Y. 669.

⁶ See 13 HARV. L. REV. 59.

⁷ *Denver & Rio Grande Ry. v. Harris*, 122 U. S. 597, 609.

⁸ *Queen v. Gt. North of England Ry. Co.*, 9 Q. B. 315; *State v. Morris & Essex R. R. Co.*, 3 Zab. (N. J.) 360.

⁹ *State v. Atchison*, 3 Lea (Tenn.) 729.

¹⁰ *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294.

¹¹ 26 Stat. at L. 209, July 2, 1890, c. 647.

¹² *State v. B. & O. R. R. Co.*, 15 W. Va. 362, 380.

Naturally the active agents are also personally liable to fine or imprisonment, and they may be indicted jointly with the corporation.¹³

CONSENT AS THE BASIS OF PERSONAL JURISDICTION. — No recovery is allowed on a foreign judgment rendered by a court having no jurisdiction.¹ Usually it is enough for the defendant to prove affirmatively that in the former action there was no personal, intra-territorial service upon him,² though this plea may be overthrown by showing that he appeared in the former action as plaintiff,³ or voluntarily and without protest as defendant.⁴ If the parties submit to the jurisdiction of the court they are normally concluded by its judgment.

Jurisdiction may also be conferred on the court by agreement between the parties. Thus an express contract so to do is sufficient.⁵ A power to confess judgment upon a note, conferred by the note itself, is valid,⁶ though it must be strictly pursued.⁷ An agreement to confer jurisdiction may also be implied. Thus where one bought stock in a French corporation, and in compliance with French law designated an agent to receive service, it is easy to find conscious assent that such service should be sufficient.⁸ The decisions go further, however, and hold valid as against a non-resident stockholder in a joint-stock company a judgment recovered against the chairman of the company by virtue of a statute which designated such chairman as the proper person to sue and be sued as the representative of the stockholders, though the stockholder had no actual notice, either of the action or of the statute.⁹ Similarly, where a statute provides that if a foreign corporation does business within the state through agents, service upon such agents is sufficient service upon the corporation, the doing of business in the state is an assent to the conditions of the statute, even though the corporation had no actual notice thereof.¹⁰ Yet in both cases there is a genuine contract flowing from consent, and not an obligation in law imposed irrespective of consent. If the defendant had had actual notice of these conditions, and had then acted as he did, this would either amount to conscious assent thereto, or estop him to deny such assent. Instead of actual, he had constructive notice, and since the law deems these equivalent, his actions give rise to a genuine contract, precisely as if there had been conscious assent. If, therefore, an agreement is relied on to give jurisdiction, the elements of a genuine contract must be found either actually or constructively.

¹³ *People v. Clark*, 8 N. Y. Crim. Rep. 179.

¹ *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670; *Bischoff v. Wethered*, 9 Wall. (U. S.) 812.

² *Sirdar Gurdyal Singh v. Rajah of Faridkote*, *supra*; *Pennoyer v. Neff*, 95 U. S. 714.

³ *Ricardo v. Garcias*, 12 Cl. & F. 367. See *Fitzsimmons v. Johnson*, 90 Tenn. 416.

⁴ *Voinet v. Barrett*, 55 L. J. Q. B. 39; *Hilton v. Guyot*, 159 U. S. 113.

⁵ *Feyericks v. Hubbard*, 18 T. L. R. 381. See, also, *Dicey, Conf. of Laws*, 369.

⁶ *Teel v. Yost*, 128 N. Y. 387; *Snyder v. Critchfield*, 44 Neb. 66.

⁷ *Grover, etc., Machine Co. v. Radcliffe*, 137 U. S. 287.

⁸ *Vallée v. Dumergue*, 4 Exch. 290.

⁹ *Bank of Australasia v. Nias*, 16 Q. B. 717; *Kersall v. Marshall*, 1 C. B. (N. S.) 240; *Bank of Australasia v. Harding*, 9 C. B. 661. See *Copin v. Adamson*, L. R. 9 Exch. 345.

¹⁰ *St. Clair v. Cox*, 106 U. S. 350.

A recent case, however, lays down that one who entered a foreign partnership "must be taken to have consented" that the foreign court should settle partnership disputes, and upon that ground holds valid a deficiency judgment recovered abroad in winding up the partnership by the foreign partners against the non-resident partner. *Emanuel v. Symon*, 23 T. L. R. 94 (Eng., K. B. D., Nov. 26, 1906). This seems to go too far. A partnership agreement is only a contract; and in general one who contracts in a foreign country does not consent either actually or constructively that disputes in regard to the contract shall be settled in the courts of that country.¹¹ Nor has partnership been held to be peculiar in this respect. A foreign partner does not, by entering the partnership, consent to be adjudged a bankrupt,¹² or to be sued as partner by third parties,¹³ without personal service. It seems doubtful, therefore, to find such consent conferred, as between the partners themselves, by the mere formation of the partnership.

RECENT CASES.

ANIMALS—TRESPASS ON REALTY—JOINT LIABILITY.—The defendants were in common occupation of a cattle range, and each of them owned several cattle in a herd. This herd entered the plaintiff's close and injured her crops. *Held*, that the defendants are jointly responsible for the damage done. *Wilson v. White*, 109 N. W. Rep. 367 (Neb.).

Ordinarily, when a trespass is committed by several animals belonging to different owners, the owners can be held severally but not jointly for the damage done. *Westgate v. Carr*, 43 Ill. 450. When the harm done by the animals of each owner cannot be ascertained, the damages are apportioned equally if the animals presumably have equal powers for doing harm. *Partenheimer v. Van Order*, 20 Barb. (N. Y.) 479. If not, they are divided according to the number of animals owned by each defendant or according to their size. *Powers v. Kindt*, 13 Kan. 74; *Wilbur v. Hubbard*, 35 Barb. (N. Y.) 303. However, when several persons have animals in their joint control and keeping they are jointly responsible. *Smith v. Jacques*, 6 Conn. 530. And it is immaterial that the animals are also owned by them severally. *Jack v. Hudnall*, 25 Oh. St. 255. When the only connection between the owners is that they occupy in common a tract of land or herd their animals together, it would seem that there ought to be no joint liability. *Cogswell v. Murphy*, 46 Ia. 44. The impracticability of putting a plaintiff to a number of actions to gain redress may, however, justify an opposite ruling. This latter view finds support in that in many states statutes exist making owners of dogs jointly injuring sheep jointly responsible. See *Nelson v. Nugent*, 106 Wis. 477.

BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—TRUSTEE EQUIVALENT TO JUDGMENT CREDITOR OR PURCHASER WITHOUT NOTICE.—A New Jersey statute provided that an unrecorded conditional sale, where the chattels were delivered to the vendee, should be void as against judgment creditors or subsequent purchasers without notice. A vendee of chattels thus sold and delivered became bankrupt. *Held*, that the trustee in bankruptcy is vested with a title unimpeachable by the vendor. *In re Franklin Lumber Co.*, 147 Fed. Rep. 852 (Dist. Ct., Dist. N. J.).

For comment on a similar case, see 20 HARV. L. REV. 65.

¹¹ *Sirdar Gurdial Singh v. Rajah of Faridkote*, *supra*. But see *Meeus v. Thelusson*, 8 Exch. 638.

¹² *Ex parte Blain*, 12 Ch. D. 522; *In re A. B. & Co.*, [1900] 1 Q. B. 541.

¹³ *Hall v. Lanning*, 91 U. S. 160.

BILLS OF PEACE—BILL TO ENJOIN NUMEROUS SUITS IN JUSTICES' COURTS AND TRY AS ONE IN EQUITY.—For violation of a city ordinance requiring street railroads under penalty to furnish sufficient cars to prevent overcrowding, etc., the appellant had begun in the justice's court sixty suits against one appellee and a hundred against the other, and was threatening more. The two appellees for themselves and others similarly situated filed a bill of peace to have the suits enjoined on the ground that the ordinance was unconstitutional. There was no allegation that irreparable damage would ensue to the appellees from the enforcement of the ordinance, and the two were practically the only ones affected thereby. *Held*, that, under these circumstances, a bill of peace will not lie. *City of Chicago v. Chicago City Ry. Co. et al.*, 78 N. E. Rep. 890 (Ill.).

As there was no allegation of irreparable damage resulting from the enforcement of the ordinance, the appellees singly, under the rule prevailing in Illinois, would not have been entitled to a bill of peace on the ground of avoiding a multiplicity of suits, at least in the absence of a determination of one in their favor. *C. B. & Q. Rd. v. City of Ottawa*, 148 Ill. 397. The rule that enjoins all but one suit which is allowed to proceed at law seems preferable. *Third Avenue R. R. Co. v. Mayor of New York*, 54 N. Y. 159. The Illinois doctrine, however, gives to many parties subject to suits a bill of peace, although it denies such relief to one party subject to many suits. As there were but two parties in the principal case, it may be defended on the ground that they were not numerous enough to support the bill. This, however, is but a question of degree and, assuming they were sufficiently numerous, the question yet remains whether a community of interest in the law and fact involved is enough on which to found a bill of peace. Though the authorities are in conflict, the better rule says that it is. *Crawford v. Mobile, etc.*, R. R., 83 Miss. 708; *contra, Ducktown, etc., Co. v. Fain*, 109 Tenn. 56. See 14 HARV. L. REV. 611.

CARRIERS—LIMITATION OF LIABILITY—DEVIATION DEPRIVING CARRIER OF EXEMPTION.—A bill of lading exempted the shipowners from liability for damage arising from the act or neglect of the master, stevedores, etc. The ship deviated from the specified course. On its arrival at its destination the goods of the plaintiff were damaged by stevedores in unloading. *Held*, that the deviation deprives the shipowners of the exemption from liability. *Thorley, Ltd. v. Orchis Steamship Co., Ltd.*, 23 T. L. R. 89 (Eng., K. B. D., Nov. 21, 1906).

It is well settled that when a carrier deviates from the route specified by his agreement with the shipper, he becomes an insurer against all damage in any way traceable to the deviation, even when exemptions in the contract cover the predominating cause of the loss. *Maghee v. The Camden & Amboy R. R. Co.*, 45 N. Y. 514; *Davis v. Garrett*, 6 Bing. 716. But it seems that the carrier would not be liable if the same damage must have occurred without deviation. See *Davis v. Garrett*, *supra*, 724; STORY, BAILMENTS, § 509. A reasonable basis for these cases is that the carrier should be liable for the direct and indirect consequences of the wrongful act of deviation. This view does not account for the present case, because the deviation was apparently not even a remote cause of the damage. The case requires the more extreme view that the breach in deviating cancelled the bill of lading and restored the carrier to his liability as insurer unrestricted by any exemptions specified therein. See *Balian v. Joly, Victoria & Co.*, 6 T. L. R. 345. The case under discussion seems to be the first direct application of this view.

CONFLICT OF LAWS—PERSONAL JURISDICTION—CONSENT AS BASIS.—The plaintiffs and defendant were members of an Australian partnership, the defendant being resident in England. The plaintiffs, without obtaining personal service on the defendant, brought action in the Australian court for dissolution of the partnership and for an accounting. They recovered a judgment, on which they sued in England. The defendant set up that the Australian court had no jurisdiction. *Held*, that the defendant by entering the partnership must be taken to have consented that the Australian court should settle part

nership disputes, and hence the judgment is valid. *Emanuel v. Symon*, 23 T. L. R. 94 (Eng., K. B. D., Nov. 26, 1906). See NOTES, p. 323.

CONFLICT OF LAWS — REMEDIES — RIGHT OF ACTION FOR DEFICIENCY ON MORTGAGE BOND GOVERNED BY FOREIGN STATUTE. — Under a New Jersey statute providing for the collection of a debt secured by bond and mortgage, a creditor was compelled first to foreclose and sell the mortgaged premises, and then, if there were any deficiency, he might sue for it upon the bond within a limited time. If he recovered judgment in such a suit, the judgment creditor might redeem the property provided his suit for redemption were brought within six months after the entry of the aforesaid judgment. *Held*, that the statute confines proceedings to collect a deficiency after foreclosure to the New Jersey courts, and hence that no action therefor is maintainable in New York. *Hutchinson v. Ward*, 114 N. Y. App. Div. 156.

The effect of the foreclosure proceedings under the statute was to extinguish the old obligation and, in case of a deficiency, to give a limited right of action therefor. See *Sea Grove, etc., Ass'n v. Stockton*, 148 Pa. St. 146. Rights are created only by law, and of course their nature and extent are governed by the law creating them. See *Lowry v. Inman*, 46 N. Y. 119, 126. Thus, it is settled that if a statute creates a liability and also limits the time in which actions may be brought upon it, the limitation as to time, being a part of the right, will be given effect by foreign courts. *Northern Pac. Lumber Co. v. Lang*, 28 Ore. 246. And where the statute creates a right and, by specifying a particular method of enforcement, indicates that the right is only to be enforced within the state, suit upon such right cannot be brought in a foreign jurisdiction. *Marshall v. Sherman*, 148 N. Y. 9; *Fowler v. Lamson*, 146 Ill. 472. Hence, if the right to sue for a deficiency in the principal case was confined by the statute creating it to a proceeding in New Jersey, as the court said, the court was clearly correct in refusing to entertain the present suit. The statute, however, does not seem to warrant that construction.

CONFLICT OF LAWS — SITUS OF CHOSSES IN ACTION — SITUS OF JUDGMENT DEBTS FOR PURPOSE OF ADMINISTRATION. — A recovered a judgment in Virginia against B, who later removed to Missouri. A died in Virginia, and the plaintiff took out ancillary papers of administration in Missouri for the sole purpose of realizing on the aforesaid judgment against B, there being no other property of the deceased in Missouri. *Held*, that the judgment debt is an asset in Missouri, and being such, will support the issuance of ancillary letters of administration for the purpose of its collection. *Miller v. Hoover*, 97 S. W. Rep. 210 (Mo., K. C. Ct. App.).

It is undoubted law that a simple contract debt is an asset where the debtor is. *Saunders v. Weston*, 74 Me. 85. As regards judgment debts, however, the English rule, followed by some authority and many dicta in this country, locates them as assets where the record is. *Anonymous*, 8 Mod. 244; *Moore v. Tanner's Adm'r*, 5 T. B. Mon. (Ky.) 42. The minority view which holds them, like simple contract debts, assets where the debtor is, seems preferable. *Swaney v. Scott*, 9 Humph. (Tenn.) 327. A judgment debt, being a chose in action, has no situs. If it can be said to be located anywhere for the purpose of administration, it must be where the court has power to reduce it to possession. See *Speed v. Kelley*, 59 Miss. 47, 51. And that is obviously where the debtor is. Moreover, unless the judgment debt is considered an asset at that place, in cases where the debtor is in a jurisdiction different from that of the record, there will be no one who can collect the debt, for it is fundamental that an administrator or executor can bring no suit outside the jurisdiction which appoints him, nor can he take out ancillary letters where there are no assets. Therefore the principal case seems sound.

CONFLICT OF LAWS — TESTAMENTARY SUCCESSION — RELATION BETWEEN EXECUTOR AND FOREIGN ADMINISTRATOR OF DECEASED. — A suit in equity was begun in Massachusetts, where the defendant, a citizen of Michigan, was personally served. Later the defendant died, and his will was

probated in Michigan. The suit in Massachusetts was continued against the administrator with the will annexed, and the decree went against him. *Held*, that the decree does not bind the executor in Michigan. *Brown v. Fletcher's Estate*, 109 N. W. Rep. 686 (Mich.).

For a discussion of the principles involved, see 19 HARV. L. REV. 628.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — REVIEW OF TAX ASSESSMENT BY COURT. — The statutes of Kentucky provided a method for the assessment of back taxes, but did not expressly provide for any notice thereof or for a hearing. The plaintiff was assessed for back taxes, but obtained an injunction from the county court restraining collection of them. At the trial the court gave a hearing upon the validity and amount of the tax, reduced the assessment materially, and declared the rest a lien on the plaintiff's property. *Held*, that such a hearing, granted as of right, is sufficient as due process of law, though not provided for by the statute. *Security Trust & Safety Vault Co. v. City of Lexington*, U. S. Sup. Ct., Dec. 3, 1906. See NOTES, p. 320.

COPYRIGHTS — INFRINGEMENT — MUSICAL COMPOSITION. — For use in a piano-player the defendant had manufactured perforated rolls of the plaintiff's copyrighted music. The plaintiff sought to enjoin this as an infringement of his copyright. *Held*, that there is no infringement. *White-Smith Pub. Co. v. Apollo Co.*, 147 Fed. Rep. 226 (C. C. A., Second Circ.).

For a discussion of the case in the lower court, see 19 HARV. L. REV. 134. *Cf. Stern v. Rosey*, 17 App. D. C. 562.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — WHAT ACCOUNT CHARGEABLE WITH INTEREST ON BORROWED FUNDS. — A tramway company, for the purpose of converting its system from horse to electric traction, issued debentures bearing interest. *Held*, that a resolution charging the interest on the debentures to the capital account is proper. *Hinds v. Buenos Ayres, etc., Tramways Co.*, [1906] 2 Ch. 654.

If the end be within the scope of the corporate charter, any means, not inconsistent with the letter or spirit thereof, which is appropriate and adapted to that end, will normally be proper. *Union Bank v. Jacobs*, 6 Humph. (Tenn.) 515. In the case at hand no question is raised as to the propriety of electrifying the road, and the power to issue debentures to meet the cost is conceded. The court finds as a fact that the work is in the nature of construction, the cost of which may properly be charged to capital rather than income. Obviously the hire of the necessary funds, or interest, is as much a part of the cost of construction as the hire of the necessary men, or wages. Hence, though there is very little authority on the point, if the cost of construction is properly charged to capital, such interest may be included. See *Bloxam v. Metropolitan Ry. Co.*, L. R. 3 Ch. 337, 351; *Bardwell v. Sheffield Waterworks Co.*, L. R. 14 Eq. 517.

CORPORATIONS — CORPORATIONS DE FACTO — SUIT ON STOCK SUBSCRIPTION. — The plaintiff had been incorporated under color of law and had been doing business for several years when the defendant subscribed for stock. *Held*, that in a suit upon such stock subscription the defendant may not set up as a defense that the plaintiff was not legally incorporated. *Farmers' Mutual Telephone Co. v. Howell*, 109 N. W. Rep. 294 (Ia.).

When the rights of third parties have been predicated in any way upon the faith of the defendant's subscription to stock, or when the defendant has received any benefits from the corporation because of such subscription, he cannot set up as a defense to a suit upon that subscription that the corporation has only a *de facto* existence. *Dows v. Naper*, 91 Ill. 44; *Weinman v. Wilkinsburg, etc., Ry. Co.*, 118 Pa. St. 192. If, however, these objections do not intervene, there seems no reason in principle why there should not be a defense. *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126. Unlike the ordinary contracts of a *de facto* corporation, the defendant in the case of a stock subscription does

not get what he contracted for. Stock in a *de facto* corporation is not so good as stock in a *de jure* corporation, and the defendant may be thrown under a personal liability which he did not contemplate. The above decision seems, nevertheless, to be in accord with the weight of authority in permitting a recovery without any consideration of the question of the interposition of the rights of third parties. *Swartwout v. Michigan Air Line Rd. Co.*, 24 Mich. 389.

CORPORATIONS — DIRECTORS — COST OF SENDING CIRCULARS AND PROXY FORMS CHARGED TO CORPORATION. — The directors of a railway company, whose policy was being attacked by a body of the shareholders, but who honestly believed in it, just before a general meeting sent out at the corporate expense circulars explaining and defending their policy, together with proxy forms with the names of certain directors thereon as proxies, with stamped envelopes for return postage. Certain shareholders applied for an injunction restraining further action of the kind by the directors. *Held*, that the application be denied. *Peel v. London & N. W. Ry. Co.*, 23 T. L. R. 85 (Eng., C. A., Nov. 19, 1906).

This case raises a question of considerable practical importance because of the prevalence of the practice of sending out, at the expense of the corporation, blank proxies and circulars. The decision seems founded on correct principles. Equity is somewhat reluctant to interfere in the internal affairs of a corporation. The shareholders must clearly show that the directors are acting either in excess of their powers or for their own interests in a manner harmful to the interest of the shareholders. See *Hawes v. Oakland*, 104 U. S. 450, 460. Directors in sending out circulars explaining and advocating this policy may well believe they are acting for the best interests of the corporation, which it is their duty to do. The sending of blank proxies with return postage would also seem within their powers, as it tends to the procurement of a full vote and the effectuation of the will of the whole body of stockholders. An earlier English case is overruled by this decision. *Studdert v. Grosvenor*, 33 Ch. D. 528. The point seems never to have been decided in America.

CORPORATIONS — STOCKHOLDERS — CONTRACT LIMITING NUMBER OF SHARES TO BE HELD BY EACH. — H was a large subscriber for shares in an organized corporation, but stock had not been issued to him. The corporate enterprise was abandoned, and H and others formed a contract for the revival of the corporation upon terms requiring that each person take no more than ten shares of stock and that H release his right to stock under his old subscription. The executors of H brought *mandamus* to compel the new corporation to issue the amount of stock for which H had originally subscribed. *Held*, that an injunction will be granted the other stockholders against the prosecution of this suit. *Hladovec v. Paul*, 78 N. E. Rep. 619 (Ill.).

There clearly was no adequate remedy at law here, since the officers of the corporation, when sued, would be unable to take advantage of the contract made between the stockholders. Equity, therefore, should grant relief, unless there is some objection on grounds of public policy. In all but a few exceptional cases it is well settled that a by-law restraining the alienation of shares of stock is void as being in restraint of trade. *Bloede Co. v. Bloede*, 84 Md. 129. A contract, however, to the same effect between stockholders rests upon an altogether different basis. *New England Trust Co. v. Abbott*, 162 Mass. 148; see *Adley v. The Whitstable Co.*, 17 Ves. Jr. 315, 323. It is often for the best interests of all concerned that there should be some such agreement. The contract, moreover, can be considered with reference to the particular transaction at hand; and, being expressly consented to by the stockholders against whom it is sought to be enforced, is not a general restraint imposed by the corporation on all persons holding stock. The decision of the above case is therefore sound, and any other result would be plainly inequitable.

CORPORATIONS — TORTS AND CRIMES — LIABILITY FOR CRIMINAL CONSPIRACY. — To an indictment for conspiracy in restraint of trade under the Sherman Anti-Trust Act, the defendant, a corporation, demurred. *Held*, that a

corporation can commit the crime of conspiracy. *United States v. MacAndrews and Forbes Co.*, 36 N. Y. L. J. 815 (Circ. Ct., S. D. N. Y., Dec., 1906). See NOTES, p. 321.

DIVORCE — ALIMONY — ASSIGNMENT OF ALIMONY. — A divorced wife who was entitled by the decree of divorce to a sum of money in full satisfaction of all claims for permanent alimony, assigned her right to a third person. *Held*, that such assignment is of no effect. *Fournier v. Clutton*, 109 N. W. Rep. 425 (Mich.).

The view in the United States seems to be that the very nature of alimony forbids alienation of it. It is given to the wife to insure her support, and for no other purpose will payment of it be enforced. *Jordan v. Westerman*, 62 Mich. 170. In England, although the cases are few, the same rule seems to apply. *In re Robinson*, L. R. 27 Ch. 160; but see *Ex parte Bremner*, L. R. 1 P. & D. 254. Similarly an allowance made by the court to a widow pending the settlement of the husband's estate is held to be inalienable, because given exclusively for her maintenance. *Hackley v. Muskegon Circuit Judge*, 58 Mich. 454. Even where the decree recites that a certain sum to be paid quarterly "shall stand as a final division of property" between the husband and wife, no assignable interest passes to the wife. *Kempster v. Evans*, 81 Wis. 247. Analogous to the above cases are those which hold that a pension granted to a public officer upon his retirement is not assignable. *Wells v. Foster*, 8 M. & W. 149. A distinction is made, however, between pensions given so that the recipient may keep himself in readiness for some future call and those given as a reward of merit. *Wells v. Foster*, *supra*; *Willcock v. Terrell*, 3 Ex. D. 323.

EASEMENTS — PRESCRIPTION — TENANT'S INTERRUPTION OF ADVERSE ENJOYMENT. — The defendant infringed easements appurtenant to land in the possession of a tenant for years. Before twenty years, the period requisite for title by prescription, had elapsed, the tenant brought suit for the infringement. After the twenty years the plaintiff as owner of the fee brought a similar suit. *Held*, that the suit brought by the tenant does not interrupt the running of the prescriptive period against the owner of the fee. *Goldstrom v. Interborough, etc., Co.*, 36 N. Y. L. J. 489 (N. Y., App. Div., Nov., 1906). See NOTES, p. 317.

ELECTIONS — CONSTITUTIONALITY OF VOTING MACHINES. — A state statute authorized the adoption of a voting machine that should secure secrecy and be generally efficient. The state constitution provided that elections should be by ballot. *Held*, that voting by the machine is voting by ballot within the meaning of the constitution. *Elwell v. Comstock*, 109 N. W. Rep. 698 (Minn.).

Voting machines not only do away with separate paper ballots, but in some cases substitute mechanical accuracy both for the sensible knowledge of the voter that he has voted as he wished and for the responsibility of officials for the count. Therefore, under the Massachusetts Constitution which provides for a written vote to be counted by officials, some judges thought that the machine's action ought to be visible to the voters and officials. On the other hand, a written vote was defined by others as a change in a material object connected with the written name of a candidate, if such change in common understanding expressed a vote. See *Opinion of the Justices*, 178 Mass. 605. This latter construction, in not limiting the meaning of the word "ballot" too strictly, follows the general purpose of the ballot to secure a free, secret, and accurately recorded vote. See *Detroit v. Board of Inspectors*, 139 Mich. 548; *Lynch v. Malley*, 215 Ill. 574. There is authority along with the present case for disregarding the more specific meaning so long as an absolutely certain meaning is not opposed. *Temple v. Mead*, 4 Vt. 535; see *State ex rel. Robertson v. McGough*, 118 Ala. 159. The result in these cases, allowing new methods of fulfilling old purposes, is surely to be desired.

EQUITY — JURISDICTION — ENJOINING TRESPASS IN FOREIGN JURISDICTION. — The plaintiff sought an injunction against continued trespasses by the

defendants on his land in a foreign jurisdiction. The defendants, who appeared, denied the plaintiff's title in the *locus in quo*. *Held*, that equity is without power to grant relief. *Columbia Nat'l, etc., Co. v. Morton*, 34 Wash. L. Rep. 766 (D. C., Ct. App., Nov. 7, 1906).

The position here taken, though supported by some authority, is unsound. For a criticism of a case presenting similar facts, see 15 HARV. L. REV. 579.

ILLEGAL CONTRACTS—EFFECT OF ILLEGALITY—WHETHER ILLEGALITY BARS RECOVERY FOR FRAUD.—Confederates of the defendants induced the plaintiff to bet upon a foot-race by telling him that it was prearranged that a certain contestant should win. The other won, as the defendants had in fact arranged. The defendants lent to this scheme the use of their bank and credit, and thus lulled the plaintiff into a sense of security. *Held*, that the plaintiff is not barred by his own illegal conduct. Sanborn, J., dissented. *Stewart v. Wright*, 147 Fed. Rep. 321 (C. C. A., Eighth Circ.).

For a discussion unfavorable to the result reached in this case, see 20 HARV. L. REV. 60.

INSANE PERSONS—LIABILITY IN TORT—RESPONSIBILITY FOR DEFECTIVE CONDITION OF REAL PROPERTY.—From a building which belonged to a lunatic a portion of the floor had been removed and the opening left unguarded. The plaintiff, apparently an invited person, fell through the hole, and was injured. She sued the lunatic and his committee. The defendants demurred to the complaint. *Held*, that the demurrer be sustained. *Ward v. Rogers*, 51 N. Y. Misc. 299.

Where the law fixes an absolute liability on the owner of property for damage suffered by others through that property, it is proper that an insane owner should bear the same burden as a sane one. On the other hand, if responsibility for a certain tort can be fixed on a particular person only because of some fault, it would seem that the responsibility of an insane actor should depend on whether or not he was, as to those acts, a blamable person. CLERK AND LIND., TORTS, 4 ed., 48. The cases recognize that an occupier of land is not an insurer of its safety as to invited persons, but only owes a duty of reasonable care to prevent damage from unusual danger. *Larkin v. O'Neill*, 119 N. Y. 221. In the principal case it is a fair inference that the defendant's insanity precluded any possibility of his having been personally blameworthy. Further, he was not liable on principles of agency, for his committee was not in control of the property as his agent, but as an officer of the court. *Kent v. West*, 33 N. Y. App. Div. 112. The decision of the court is therefore sound, but in principle seems inconsistent with the doctrine previously enunciated by the New York Appellate Division. *McCabe v. O'Connor*, 4 N. Y. App. Div. 354. *Cf. Williams v. Hays*, 143 N. Y. 442.

INTERSTATE COMMERCE—CONTROL BY STATES—ATTACHMENT OF ROLLING STOCK OF NON-RESIDENT CARRIER AND GARNISHMENT OF CONNECTING CARRIERS FOR FREIGHT COLLECTIONS.—The plaintiff brought suit in Iowa for a tort committed in Illinois by an Ohio corporation having no agent in Iowa. He attached some of the defendant's freight cars that were in Iowa in the possession of other railways, which had received them at a point outside the state and which were, by agreement, either forwarding them to the consignees of the freight or returning them empty to the defendant. Also, these other railways, foreign corporations having agents in Iowa, were garnished for freight collections which they might owe the defendant. An Act of Congress authorized railways to arrange for continuous carriage. *Held*, that the attachment and garnishment are regulations of interstate commerce not within the power of a state. *Davis v. Cleveland, etc., Ry. Co.*, 146 Fed. Rep. 403 (Circ. Ct., N. D. Ia., W. D.). See NOTES, p. 319.

INTERSTATE COMMERCE—CONTROL BY STATES—RIGHT TO STOP THROUGH TRAINS.—The Mississippi legislature established a railroad commission with discretionary power to cause all trains to stop at county-seats and at other places where business or public convenience should require. The commission

required two through trains, carrying mails from Chicago to New Orleans under special contract with the United States government, to stop at a county-seat already adequately provided with train service. *Held*, that this is an improper interference with interstate commerce. *Miss. Ry. Commission v. Ill. Central Ry.*, U. S. Sup. Ct., Dec. 3, 1906.

For a discussion of the principles involved, see 10 HARV. L. REV. 378.

INTERSTATE COMMERCE — INTOXICATING LIQUORS — DEFINITION OF "ARRIVAL" IN WILSON ACT. — The Wilson Act of 1890 provided that liquors transported into a state should, upon arrival in the state, become subject to the police law thereof. Acting under such state law, officers seized liquor in a railway warehouse before notice had been sent to the consignee or before a reasonable time for removal had elapsed. *Held*, that the seizure is unlawful, since the liquors have not "arrived" within the meaning of the Wilson Act. *Heymann v. Southern Ry. Co.*, U. S. Sup. Ct., Dec. 3, 1906.

It has been held that liquors have not "arrived in the state" within the meaning of the Act, and therefore remain articles of interstate commerce, when they have just been unloaded on the station platform at their destination. *Rhodes v. Iowa*, 170 U. S. 412. The present case further decides that even after removal to the railway warehouse they have not "arrived." Both cases suggest that the goods would have "arrived" after delivery to the consignee or storage for him, though they were still in the original packages. This interpretation twists the literal meaning of the word in order to follow the general tenor of the Act and the intention of Congress presumed from the occasion of its enactment. See *Rhodes v. Iowa*, *supra*. There is further reason for this interpretation under the theory that the federal commerce power is exclusive of that of the states; for if the Act were construed to give control of interstate liquor shipments before delivery, with the consequent direct effect on the shipping contracts, it would not merely mark the time at which imported goods should come under state laws, but would more plainly allow states to regulate interstate commerce. See *American Express Co. v. Iowa*, 196 U. S. 133.

LEGACIES AND DEVISES — CONSTRUCTION — DIRECTION TO PURCHASE ANNUITY AS CREATING VESTED LEGACY. — A testator devised his residuary estate to trustees upon trust to purchase in the name of the testator's wife a government annuity of a certain value. The wife survived the testator, but died before the will had been proved without having made any election to take the value of the annuity in cash. The administrators of the widow's estate claimed the sum which, at the testator's death, would have purchased such an annuity. *Held*, that they are entitled to it. *In re Robbins*, [1906] 2 Ch. 648.

Since the beneficiary of such a provision could immediately resell the annuity, the English courts do not compel the trustee to purchase it if the beneficiary elects to take the value directly. *Ford v. Batley*, 17 Beav. 303. This procedure may sometimes avoid a useless diminution in the sum realized by the beneficiary, but the advisability of discharging a trust in a way so obviously adapted to defeat the object of the settlor is doubtful. It is but a short step to say that since the annuitant has this right of election, there is in effect a legacy the right in which vests at once on the testator's death. *Bayley v. Bishop*, 9 Ves. Jr. 6. Such is the construction in the present case. The English courts have refused, however, to apply this principle where the testator had provided for limitations over in case the beneficiary should assign. *Power v. Hayne*, L. R. 8 Eq. 262. Since the necessary consequence of the application of this doctrine is to transfer a fund to persons for whom the testator never intended to provide, it seems a proper place to hold rather that the trust has failed.

LIENS — PRIORITIES — CONFLICTING CLAIMS. — An agreement by the tenant to mortgage his crop was inserted in a contract to lease certain land, and A, the lessor, failed to record the instrument. B later obtained a mortgage on the same crop, by its terms subject to A's claim, and recorded it. Subsequently C, ignorant of A's rights, became the tenant's creditor and secured an attachment lien against his crop. A statute provided that instruments creating legal or

equitable interests must be recorded in order to give rights superior to those of creditors. Suit was brought in equity to determine the priority of the claims of the respective parties. *Held*, that C should be preferred first, and A second. *Bowles' Exec. v. Jones*, 96 S. W. Rep. 1121 (Ky.).

Since B's mortgage was by its terms subject to A's equitable claim, as between the two the fact that A failed to record the instrument under which he claimed could make no difference. *Howard v. Chase*, 104 Mass. 249. As between B and C, B's rights were superior because his mortgage was recorded before C became a creditor. See 7 HARV. L. REV. 241. If C had no notice actual or constructive of A's unrecorded lien, he should be preferred before A. *Wicks v. McConnell*, 102 Ky. 434. Even if this were the case it would be difficult to find a ground for preferring C's claim to B's, for it can hardly be maintained that B was guilty of misconduct. *Hoag v. Sayre*, 33 N. J. Eq. 552. It has been stated that subsequently acquired liens subject to a second mortgage which was by its terms subject to a first mortgage must necessarily be subject to the first. See *Bundy v. Iron Co.*, 38 Oh. St. 300, 312. This line of reasoning applies here. The filing of B's mortgage should be held to be constructive notice of A's claim, to which it specifically refers, and the order of preference should be, first A, then B, and last C.

LIMITATION OF ACTIONS — NEW PROMISE AND PART PAYMENT — EFFECT WHEN MADE BY ONE OF JOINT OBLIGORS. — A statute provided that the real estate of a deceased debtor should be assets for the payment of his debts. A testator devised to his son a part of his real estate which was encumbered with a mortgage debt. The devisee paid interest on the debt for thirty years. Then the mortgagee secured judgment against the testator's executor. The residue of the testator's land had been sold under the terms of a trust imposed by the will, and the judgment creditor claimed the fund in the hands of the trustee as assets of the estate. The beneficiaries of the trust were permitted to plead the Statute of Limitations. *Held*, that part payment by the devisee of the mortgaged property does not keep the debt alive as to property not in the first instance charged with it. *In re Lacey*, 41 L. Jour. 754 (Eng., Ch. D., Nov. 15, 1906).

For comment on an opposite decision by the same court, see 19 HARV. L. REV. 57.

MUNICIPAL CORPORATIONS — OFFICERS AND AGENTS — EFFECT OF RE-ELECTION AFTER OUSTER. — The defendant, the mayor of Kansas City, had been guilty of official misconduct. In *quo warranto* proceedings judgment of ouster was rendered against him, expressly excluding him from his office for the remainder of his term. During the forbidden period he was again elected mayor, and assumed to exercise the powers of the office. *Held*, that he may be punished for contempt. *State v. Rose*, 86 Pac. Rep. 296 (Kan.). See NOTES, p. 316.

NEGLIGENCE — DUTY OF CARE — TRESPASSING CHILDREN ON HIGHWAY. The defendant's employees were stringing cable on the highway by a rope passed through a pulley and attached to a team of horses. The employees several times chased children away from the machinery. While the rope was still, the plaintiff, a child of seven years, took hold of it near the pulley. The employees started the team, and the plaintiff's hands were crushed. *Held*, that the judgment for the plaintiff be affirmed. Two judges dissented. *O'Leary v. Michigan State Telephone Co.*, 109 N. W. Rep. 434 (Mich.).

The law in this sort of case is in a confused, unsatisfactory condition. There appears, however, in recent cases a wholesome tendency to decide these questions from the standpoint of public policy. See 11 HARV. L. REV. 349, 360; 12 *ibid.* 206. In the case at hand, both parties were where they had equal rights to be, as distinguished from the turntable cases. The defendant's knowledge of the proximity and the inclinations of the children warned it that danger to them was imminent rather than merely possible. Thirdly, not the plaintiff's trespass, but the defendant's act brought the force into play. This leaves us

to balance harm to trespassing children against a restraint on the beneficial uses of machinery in that the owner should exercise due care while operating it on highways when he can reasonably anticipate that children are in perilous situations. So from the standpoint of public policy the decision seems correct. Although a search of the authorities reveals only distinguishable states of fact, the reasoning in somewhat similar cases where the defendant was held liable supports the one at hand. *Powers v. Harlow*, 53 Mich. 507; *Lynch v. Nurdin*, 1 Q. B. 29. And in those *contra* the reasoning does not always oppose it. *Bishop v. Union Ry. Co.*, 14 R. I. 314; but see *Mangan v. Atterton*, L. R. 1 Exch. 239.

NUISANCE — RECOVERY OF DAMAGES — RECOVERY BY LESSEE OF PREMISES RENDERED UNINHABITABLE. — The defendant so negligently conducted building operations on a lot adjoining a dwelling-house occupied by the plaintiff under a lease, that the latter premises were rendered uninhabitable. *Held*, that as items of damage the plaintiff may recover, (1) the cost of storing his furniture until the expiration of his lease, (2) the difference in living expenses after removing from the house, (3) for the loss of comfort suffered by the plaintiff and his family in consequence of the defendant's negligent acts. One justice dissented. *McFadden v. Thompson-Starrett Co.*, 36 N. Y. L. J. 871 (N. Y., Sup. Ct., Dec., 1906).

It seems generally settled that upon a wrongful eviction by the landlord, a tenant's recovery is limited to the difference between the value of the lease and the rent reserved. *Trull v. Granger*, 8 N. Y. 115. So, though the eviction may result in loss of profits, the tenant is not allowed compensation therefor. *Dennison v. Ford*, 10 Daly (N. Y.) 412. One case finds justification for this doctrine in the analogy between a leasehold and a personal chattel, the theory being that since the owner of a chattel is not allowed compensation for possible profits from its use, the tenant whose lease is destroyed should be similarly limited in his recovery. See *Dennison v. Ford*, *supra*. But a leasehold, whether used as a dwelling-place or a place of business, is sufficiently differentiated from a personal chattel to justify a different rule. *Shaw v. Hoffman*, 25 Mich. 162. In considering the tenant's damage it seems immaterial, aside from his liability for rent, whether he be evicted by his landlord or by an independent wrongdoer. Thus there is force in the contention of the dissenting judge that the measure of damages should be the same in both cases. The present decision, however, seems right in result, and to indicate an error in the rule applied in the constructive eviction cases. See *Shaw v. Hoffman*, *supra*. Cf. 19 HARV. L. REV. 50.

POLICE POWER — REGULATION OF PROPERTY AND USE THEREOF — SALE OF PATENT RIGHT. — A Kansas statute required the filing of copies of letters patent before a sale of the patent rights. It was contended that the statute violated the constitutional right of Congress to grant patents and the federal laws giving free rights to sell them. An Arkansas statute made a note given in payment for a patent right void if it did not show on its face for what it was given. *Held*, that both statutes are valid as reasonable exercises of the states' police power. *Allen and Allen, Adm. v. Riley*; *Woods and Sons v. Carl*, U. S. Sup. Ct., Dec. 3, 1906.

The use of articles made under letters patent is subject to the same control by the state as other articles of the same nature. *Patterson v. Kentucky*, 97 U. S. 501. But the intangible property arising from a patent right has been distinguished. See *Castle v. Hutchinson*, 25 Fed. Rep. 394. And the validity of statutes regulating the sale of such rights has been denied. *Hollida & Ball v. Hunt*, 70 Ill. 109; *Pegram v. American Alkali Co.*, 122 Fed. Rep. 1000. But the better view seems to be that such regulation is within the police power of the state. *Brechbill v. Randall*, 102 Ind. 528; *State v. Cook*, 107 Tenn. 499. The present decisions are the first on the subject by the Supreme Court. The reasoning of the court is that patent rights form a peculiar class, in the sale of which fraud is easily accomplished, and that regulation of such sales by the state to protect its citizens from frauds does not interfere with any federal

legislation. Neither the filing of papers nor the statement of the consideration on the face of notes given for the sale interferes with the exclusive right of the patentee or his assigns to sell. And it is only this right to exclude others which has been given by Congress. See *In re Brosnahan*, 18 Fed. Rep. 62.

PROHIBITION—NOT MAINTAINABLE WHERE ANOTHER REMEDY EXISTS.—The relator was served with a subpoena entirely insufficient in substance under circumstances such as to warrant the conclusion that the information was laid before the magistrate simply to serve private ends. To resist the subpoena, for disobedience of which both a fine and imprisonment were prescribed, the relator brought a writ of prohibition. *Held*, that although the subpoena is void, a writ of prohibition will not be granted, since the relator has an adequate remedy through a writ of *habeas corpus*. Two judges dissented. *People ex rel. Livingston v. Wyatt, Justice*, 36 N. Y. L. J. 829 (N. Y., Ct. App., Nov. 20, 1906).

Although an inferior court has acted in relation to a matter within its jurisdiction, a writ of prohibition may nevertheless issue in case of the use of an unauthorized power. *Appo v. The People*, 20 N. Y. 531; *In re Holmes*, [1895] 1 Q. B. 174. But it is a fundamental principle that where there is adequate relief in another form this extraordinary remedy cannot be invoked. *Ex parte Braudlacht*, 2 Hill (N. Y.) 367. It has been said that until the party aggrieved has applied in vain to the inferior tribunal for relief there can be no recourse to prohibition. See HIGH, EXTRAOR. REM., § 765. This seems to be true, however, only in case an appeal would lie from the lower court's decision, and there was no provision for such an appeal in the present case. The argument of the court that *habeas corpus* would afford adequate relief seems scarcely satisfactory. No escape is left the relator from being adjudged in contempt of court, subject to a fine and at least temporary arrest. Such a result conflicts, too, with the sounder, though somewhat extreme, view that other remedies which will preclude one from relief by prohibition must be equally effective and reasonably prompt and efficient. See *State v. Elkin*, 130 Mo. 90, 109.

RAILROADS—POWER TO LEASE—LIABILITY OF LESSOR FOR NEGLIGENCE OF LESSEE.—Under statutory authority the defendant company had leased its line to a company which thereafter exercised complete supervision and control. The plaintiff was injured by the negligence of the servants of the lessee company and attempted to recover against the lessor company. *Held*, that the defendant, having leased its property by authority of statute, is not responsible for the negligence of the lessee company. One justice dissented. *Moorshead v. United Rys. Co.*, 96 S. W. Rep. 261 (Mo., St. Louis Ct. App.).

There is a sharp conflict on the point here involved. Some courts maintain that even though a railroad lease have legislative sanction, the lessor company nevertheless remains liable for the lessee's negligence. This view is based upon the impolicy of permitting a corporation originally clothed with public franchises to cast the attendant liabilities upon other corporations of, perhaps, doubtful responsibility. *Chollette v. Omaha & R. V. Rd. Co.*, 26 Neb. 159. These courts have gone so far as to hold the lessor liable to employees of the lessee injured by the latter's negligence. *C. & G. T. Ry. Co. v. Hart*, 209 Ill. 414; *contra, Va. Midland Ry. Co. v. Washington*, 86 Va. 629. Other jurisdictions hold that statutory authorization of the lease carries with it, by necessary implication, exemption of the lessor from continuing liability, the contention being that liability for negligent operation is inseparable from the power of controlling operation. *Pinkerton v. Traction Co.*, 193 Pa. St. 229. The present well-considered decision seems to be in accord with the better reasoning, and with the slight weight of authority. Distinctions in these cases are properly drawn between liability for injuries due to negligent operation and those due to defective original construction. *St. L., W. & W. Ry. Co. v. Curl*, 28 Kan. 622. Distinctions are also drawn, though with less propriety, between duties imposed by charter or statute and duties imposed by common law. *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165.

RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — AGREEMENT AS TO SALE OF CHATTELS — EFFECT ON SUB-VENDEE. — The plaintiffs, publishers, printed in their books a notice that the books were to be sold only at a certain price, at retail, and by their authorized agents, and that purchasers should not re-sell within a certain time. On breach of any of these stipulations, the title was to revert in the publishers. The defendant, with knowledge of this notice, violated its conditions. *Held*, that there may be a preliminary injunction to restrain him. *Authors and Newspapers' Ass'n v. O'Gorman Co.*, 147 Fed. Rep. 616 (Circ. Ct., Dist. R. I.).

For a discussion of the principles involved, see 17 HARV. L. REV. 415. *Cf. Bobbs-Merrill Co. v. Straus*, 147 Fed. Rep. 15 (C. C. A., Second Circ.); *Scribner v. Straus*, 147 Fed. Rep. 28 (C. C. A., Second Circ.).

STATUTE OF FRAUDS — PART PERFORMANCE — REPUDIATION OF CONTRACT BEFORE ACTION UPON IT. — The defendant orally agreed to give the plaintiff a ten-year lease of certain premises. Later a disagreement arose, the defendant claiming it was to be for only five years. Though the plaintiff was informed that he could not have a lease for more than five years, he entered, made improvements, and demanded the execution of a ten-year lease. *Held*, that the contract cannot be enforced. *Czermak v. Wetzel*, 100 N. Y. Supp. 167 (App. Div.).

This New York decision illustrates the true principle on which specific performance of oral contracts within the Statute of Frauds is given when there is part performance by the plaintiff. The true basis of equity's interference is not that it is giving specific performance of the oral contracts, but the feeling that the promisee has an equity when, relying on the agreement, he has changed his position so that he cannot be adequately reimbursed nor put in as favorable a position as before. See 15 HARV. L. REV. 659. When the promisor repudiates the contract and the promisee, with notice, nevertheless sets out to act upon it, the theory on which equity proceeds in these cases does not apply. *Parke v. Leewright*, 20 Mo. 85; see *Wood v. Thornley*, 58 Ill. 464, 471. The promisor is innocent of any fraud; the promisee cannot say that he has acted on the faith of the promise. The promisor may lawfully stand on the statute, and refuse to perform the agreement. See *Dunphy v. Ryan*, 116 U. S. 491, 498. Having done so, he may allow the tenant to enter on other terms, without providing him with an equity.

TAXATION — PARTICULAR FORMS OF TAXATION — STATE INHERITANCE TAX ON STOCK OF SIMULTANEOUSLY INCORPORATED TWO-STATE CORPORATIONS. — A New York statute imposed an inheritance tax of 5 per cent upon all "property within the state" belonging to a non-resident decedent. A Connecticut decedent left in Connecticut shares in the Boston & Albany Railroad, a corporation simultaneously and in good faith incorporated both in New York and in Massachusetts. The main offices of the company and five-sixths of its trackage were in Massachusetts. New York officials assessed the shares at their full market value. *Held*, that they should be assessed at a value representing the proportion of the corporation's property within the state. *Matter of Cooley*, 186 N. Y. 220. See NOTES, p. 313.

TAXATION — PURPOSES FOR WHICH TAXES MAY BE LEVIED — RELIEF OF BLIND. — A statute provided that all blind adults who had been residents of the state for five years and had no means of support should be entitled to not more than twenty-five dollars per capita quarterly from the county treasury. *Held*, that the statute is unconstitutional, as it requires the expenditure for a private purpose of public funds raised by taxation. *Auditor of Lucas County v. State ex rel. Boyles*, 78 N. E. Rep. 955 (Oh.).

It is settled law that taxation can only be for public purposes. *Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655. But the line between what is a public and what is a private purpose has not been definitely determined. There are, though, some indicia of a public purpose that are established. Thus, if the general well-being of society and the present and prospective happiness and

prosperity of the people be subverted or advanced, the purpose is public. See *People v. Salem*, 20 Mich. 452. The benefit to the public, however, must be direct and not merely incidental or consequential. *Weismer v. Village of Douglas*, 64 N. Y. 91. The relief of the poor and the care of those who are unable to take care of themselves are among the unquestioned objects for which taxes may be laid. *State ex rel. Goodwin v. Nelson County*, 1 N. D. 88; see *Booth v. Town of Woodbury*, 32 Conn. 118, 128. Tested by these principles, it is hard to see why the general purposes in the present case were not of a public character. Under the operation of the statute, however, as it provided for no inquiry subsequent to the one awarding the aid, a beneficiary would still be entitled to receive his bounty after becoming self-supporting. Such a result would render the tax clearly unconstitutional.

TRUSTS — CREATION AND VALIDITY — PROVISION FOR INTEREST AND FINAL DISPOSITION. — The plaintiff's testator gave to the defendant a sum of money on the understanding that the latter should pay interest thereon to the testator during his life, and upon his death dispose of the sum according to instructions in a letter to be left by the testator. Upon the death of the testator, though the letter of instructions was duly found, his personal representatives claimed the fund. *Held*, that whether the agreement created a trust or not, the personal representatives cannot recover from the defendant. One justice dissented on the ground that the agreement resulted in a mere loan. *Morris v. Wucher*, 100 N. Y. Supp. 878 (App. Div.).

In spite of the court's hesitation as to the grounds for its decision, the result is undoubtedly correct. The fact that interest was to be paid on the amount is sufficient, according to the better view, to negative the existence of a trust. *Pittsburgh Nat'l Bk. v. McMurray*, 98 Pa. St. 538. The conclusion of the dissenting justice, however, that on that account the transaction can result in nothing but a debt recoverable by the testator or his representatives, does not follow. The defendant took title under a contract, first to pay interest, and second to make certain final disposition of the money received, and he cannot be compelled to do other than fulfil his contract. *Cf. Scrugg v. Alexander*, 72 Mo. 134. This conclusion is not open to the objection that it permits testamentary disposition of property without the formalities required by the Wills Act, for the testator parted with control at the time of the original transfer. A similar decision was reached in an English case on the erroneous ground that a valid trust was created. *Moore v. Darton*, 4 De G. & Sm. 517.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEE — EQUITABLE SET-OFF AGAINST INSOLVENT CESTUI QUE TRUST. — The estate of a *cestui que trust* brought suit for an account against the trustee's estate. The latter claimed the right to set off against the trust obligation certain claims held by the trustee personally against the *cestui*. The *cestui's* estate was insolvent. *Held*, that, owing to the insolvency, the set-off will be allowed in equity. *Smith v. Perry*, 95 S. W. Rep. 337 (Mo., Sup. Ct.).

At law only mutual debts may be set off against each other. *Tagg v. Bowman*, 99 Pa. St. 376; see MO. REV. STAT. 1899, §§ 4487-4499. It is also established that ordinarily a trustee when called on to account for trust property cannot set off personal claims against the *cestui*. *First Nat'l Bank v. Barnum Wire Works*, 58 Mich. 124, 315. But equity allowed set-off in general before statutes allowed it at law. *Ex parte Stephens*, 11 Ves. Jr. 26. And equity may, therefore, go further than the statutes and enforce by way of set-off cross-demands, whether arising out of the same or disconnected transactions, and whether liquidated or unliquidated. A ground of such equitable set-off is the insolvency of the party against whom it is claimed. *St. Paul Trust Co. v. Leck*, 57 Minn. 87. The extent to which the cases have gone has been to stay the collection of a liquidated claim until an unliquidated cross-claim should be determined and set off. *North Chicago Rolling Mill Co. v. St. Louis Steel Co.*, 152 U. S. 596. The present case goes further in allowing the set-off of a legal against an equitable claim. On its facts this case does not seem open to the objection of working an injustice to other creditors of the

cestui. It may therefore be supported as an extension of the general doctrine of equitable set-off.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — PROFITS ARISING FROM COMBINATION OF TRUST AND PERSONAL INTERESTS OF TRUSTEE. — The defendant was trustee of the plaintiff group of gas companies with entire control. He also owned a controlling interest in the competing group of companies. A coke manufacturing company needed a market for its by-product gas. By contemporaneous transactions the defendant entered into long-term contracts with it on behalf of the plaintiff companies and sold out his personal holdings in the other companies at an abnormal profit. *Held*, that the plaintiff companies are entitled to an equitable share of the personal profits. *Bay State Gas Co. v. Rogers*, 147 Fed. Rep. 557 (Circ. Ct., Dist. Mass.).

That a trustee cannot make use of trust-funds for private profit is fundamental. If he trade or speculate with them, he must account to the *cestui* for gains. *Norris's Appeal*, 71 Pa. St. 106. Only by removal of all temptation of self-interest can trustees' loyalty and prudence to defenseless *cestuis* be assured. 1 PERRY, TRUSTS, 5 ed., §§ 427 *et seq.* Nor can the trustee reap incidental benefit from his office, though the *cestui* himself could never have obtained it. *White v. Sherman*, 168 Ill. 589. If he himself act as solicitor or broker for his *cestui*, he gets nothing for his services, though he might have paid others for them. *Broughton v. Broughton*, 5 De G. M. & G. 160. He cannot buy up at a discount claims against the estate or incumbrances upon it and pocket the difference. *Rankin v. Barcroft & Co.*, 114 Ill. 441. Only Kentucky seems favorably disposed toward any kind of incidental profit. *Bush v. Webster*, 72 S. W. Rep. 364. The fiduciary capacity does not, however, disqualify a trustee from making profit in a common or joint enterprise with his *cestui*. *Levi v. Evans*, 57 Fed. Rep. 677. But equal zeal must be used in furthering each interest. *Scott v. Ray*, 18 Pick. (Mass.) 360. In the principal case single ownership of the combined interests involved a strategic position, intrinsically valuable, which could be realized on by sale of either holding. The profit should therefore be apportioned.

WILLS — JOINT WILLS — REVOCATION. — A and B made a joint will whereby each left his property to the other for life, and at the death of the survivor all the property of both was to go to C. A died. B accepted the decedent's estate, and then made another will revoking the first. *Held*, that C may recover such property from the defendants, to whom B voluntarily transferred it during his life, as he would have been entitled to under B's first will. *Bower v. Daniel*, 95 S. W. Rep. 347 (Mo., Sup. Ct.). See NOTES, p. 315.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

RIGHTS OF THE JAPANESE IN CALIFORNIA SCHOOLS. — Much popular discussion has been evoked by a rule adopted on October 11, 1906, by the board of school trustees of San Francisco, which provides that Japanese children shall attend schools set apart for Chinese, Japanese, and Koreans, and excludes them from other schools. In considering whether or not such action violates any rights of the Japanese, it may be well first to look at the question apart from the treaty between the United States and Japan.

It is generally held that local school officials have no power thus to provide for separate schools in the absence of express legislative authority.¹ But in the

¹ *Ottawa Board of Education v. Tinnon*, 26 Kan. 1; *Wysinger v. Crookshank*, 82 Cal. 588.

present case such authority is probably conferred by § 1662 of the Political Code of California of 1903, which provides that "trustees shall have the power to . . . establish separate schools for Indian children and for children of Mongolian or Chinese descent." It can hardly be questioned but that "Mongolian" is used here in its broadest sense and includes Japanese.¹ The question then arises whether the action of the school board, though authorized by the legislature, is violative of any rights of the Japanese under the federal Constitution. The first section of the Fourteenth Amendment secures to all persons, thus including aliens,² the equal protection of the laws. It is well established, however, that even in the case of a citizen this clause does not prevent the segregation in public schools of different races.³ The rights of an alien would not be any greater than those of a citizen. But though different races may be segregated, no race may be accorded better treatment than another. So no constitutional rights of the Japanese have been violated in the present case unless the schools for Japanese and for whites offer the latter greater advantages, or unless there is more than a reasonable difference in their accessibility. The former supposition the evidence at hand seems to negative, but it may be that the Japanese school is unreasonably difficult of access.⁴ Even in such a case it will have to be established — though this seems not an insuperable difficulty — that aliens have rights in public property, such as public schools. This last objection would very probably not have to be met in the case of Japanese children born in this country, since they are citizens of the United States.⁵ On the other hand, such children have, it is clear, no rights under the treaty.

In making inquiry as to whether any treaty rights of Japanese who were born in Japan have been violated, it may well be noted that there is doubt as to whether the treaty-making power of the United States would justify it in guaranteeing to a foreign sovereign for his subjects a greater right or privilege than citizens of this country possess, — the privilege of exemption from racial segregation in schools. For though no case has arisen in which the treaty-making power has been held to be exceeded,⁶ there is a general opinion that it has substantial limits.⁷ On the whole, however, it seems probable that it would be held to extend to the case in hand.⁸ In a recent article Mr. Edwin Maxey comes to the further conclusion that the treaty actually does guarantee to all Japanese subjects freedom from segregation, and that San Francisco has violated this treaty right. *Exclusion of Japanese Children from San Francisco Schools*, 16 Yale L. J. 90 (December, 1906). The material part of the treaty reads as follows: "in whatever relates to rights of residence and travel . . . the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties and rights . . . [as] native citizens or subjects, or citizens or subjects of the most favored nation."⁹ Granting with Mr. Maxey that "rights of residence" include school privileges, it is hard to see how the treaty gives the Japanese any rights that are necessarily violated by the segregation order. This is clear as to the clause that gives them the same rights as have citizens of the United States. And even the citizens of the most favored nation are subject to segregation in our schools. A colored British subject would have to attend the schools for negro children, and a white British child the schools for white children, wherever there is segrega-

¹ See 2 Encyc. Britannica, 9 ed., 113.

² *Yick Wo v. Hopkins*, 118 U. S. 356, 369.

³ *Lehew v. Brummell*, 103 Mo. 546.

⁴ See the report of Secretary Metcalf, which accompanied the President's Message to Congress of December 18, 1906.

⁵ *In re Look Tin Sing*, 10 Sawy. (U. S. C. C.) 353.

⁶ *Butler, Treaty Making Power*, § 454.

⁷ 2 Northwestern L. Rev. 1; same article in 1893 Am. Bar Ass'n 243. Cf. U. S. Rev. Stat. § 709. See *Geofroy v. Riggs*, 133 U. S. 258, 267.

⁸ Cf. *Geofroy v. Riggs*, *supra*.

⁹ 29 U. S. Stat. at L. 848.

tion of negroes and whites. It is merely incidental that Japanese subjects are very generally of the Japanese race; German subjects are generally white, and would have to attend the schools for whites. The whites are segregated as much as the negroes or the Japanese. It must be clear that it is the Japanese as a race, not as subjects of the emperor of Japan, who are segregated, since American citizens of Japanese descent are included as Japanese. To interpret the treaty to stipulate against school segregation of the Japanese as a race, as contrasted with Japanese subjects, would be to adopt a very strained construction which would raise grave questions as to the extent of the treaty-making power. It must be remembered that segregation is not discrimination at all, and cannot fairly be said to be a denial of equal privileges, liberties, and rights, any more than under the Fourteenth Amendment it is a denial of the equal protection of the laws.

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- AFFIDAVITS IN ATTACHMENT. I. *Raymond D. Thurber*. A summary of the law and collection of authorities on the probative value of affidavits in proceedings for the attachment of property. 7 *Bench & Bar* 55.
- CONTROL OF CORPORATIONS, THE. *Frederick N. Judson*. Maintaining that the most advisable method of controlling corporations is not by forfeiture or suspension of the exercise of the corporate functions, but by enforcing a strict responsibility on the part of the officers and members of the corporations for corporate acts. 18 *Green Bag* 662.
- DIVORCE PROBLEM AND RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, THE. *D. D. Murphy*. After discussing *Haddock v. Haddock* and *Atherton v. Atherton*, contending for more uniform divorce laws. 14 *Am. Lawyer* 499. See 19 *HARV. L. REV.* 586.
- DO WE NEED A "SALE OF GOODS" ACT IN NEW YORK? *E. Lyman Tilden*. A comparison of the simplicity of the English statute with the complexity and apparent conflict of New York decisions; concluding that a codification of the law of sales is highly desirable. 68 *Alb. L. J.* 303.
- ENTITY THEORY IN CORPORATION LAW, THE. *Anon.* Showing how the fiction of corporate entity is in some cases set aside to prevent injustice. 32 *Nat. Corp. Rep.* 881. See 20 *HARV. L. REV.* 78; *ibid.* 223.
- EVOLUTION OF THE LAW BY JUDICIAL DECISION. I. *Robert G. Street*. Discussing the responsiveness of all judge-made law to public opinion, enumerating the influences of the Roman law upon the common law, and emphasizing the chaotic condition of the latter. 14 *Am. Lawyer* 490.
- EXCLUSION OF JAPANESE CHILDREN FROM THE PUBLIC SCHOOLS OF SAN FRANCISCO. *Edwin Maxey*. 16 *Yale L. J.* 90. See *supra*.
- FREEDOM OF THE EXECUTIVE IN EXERCISING GOVERNMENTAL FUNCTIONS FROM CONTROL BY THE JUDICIARY. I. *John Campbell*. A Colorado view of the governor's right to declare martial law and suspend the writ of *habeas corpus*. 14 *Am. Lawyer* 503.
- INDEX OF COMPARATIVE LEGISLATION, AN. *W. F. Dodd*. Reviewing the best existing summaries of comparative legislation and making suggestions for the proposed summary to be published by the United States Government. 1 *Am. Pol. Sci. Rev.* 62.
- LAW OF OFFICERS, THE. *Leonard Felix Fuld*. Treating the subject under the headings *de facto* officers and qualifications for office. 14 *L. Stud. Helper* 266, 329.
- LIMITATION OF LIABILITY OF VESSEL OWNERS. *James D. Dewell, Jr.* Pointing out that the owner of a vessel, by moving causes of action against him into the federal district courts, can, in many cases by the aid of federal statutes, lessen his common law liability. 16 *Yale L. J.* 84.
- MOVEMENT FOR AN INTERSTATE ORDER BILL OF LADING. *Anon.* Commenting on the need for reformation of the law of bills of lading and explaining the legal effect of proposed amendments to the federal rate bill. 23 *Banking L. J.* 866.
- NEGRO SUFFRAGE: THE CONSTITUTIONAL POINT OF VIEW. *J. C. Rose*. Discussing the methods by which a large part of the negro population of the South is prevented from voting. 1 *Am. Pol. Sci. Rev.* 17.
- NEWFOUNDLAND FISHERIES' DISPUTE, THE. *Alfred B. Morine*. Explaining the questions at issue, and raising questions as to the construction of the treaty of 1818 which defines the rights of Americans. 5 *Can. L. Rev.* 414.

- NEW YORK MORTGAGES AND THE RECORDING ACTS. *Edgar Logan*. Noting the difficulties of assignees of mortgages under recent conflicting New York decisions. 6 Colum. L. Rev. 547.
- ORDINARY AND THE ULTIMATE PURCHASER, THE. *Bernard C. Steiner*. A treatment of the law of unfair competition so far as it relates to the protection of purchasers. 16 Yale L. J. 112.
- PEREZ v. FERNANDEZ — CONFLICT BETWEEN CIVIL AND COMMON LAW IN OUR NEW POSSESSIONS. *Anon.* Criticizing the decision found in 202 U. S. 80 in which the court went far to continue a difference in procedure. 63 Cent. L. J. 411.
- PROVINCE OF THE JUDGE AND OF THE JURY, THE. *G. Glover Alexander*. The historical development. 32 L. Mag. & Rev. 72.
- REFORMS IN THE LAW OF FUTURE INTERESTS NEEDED IN ILLINOIS. I. *Albert Martin Kales*. 1 Ill. L. Rev. 311.
- THEORY OF THE CASE, THE. *Anon.* Criticizing the tendency of the courts in code states to depart from the issue of the pleadings. 63 Cent. L. J. 395.

II. BOOK REVIEWS.

THE LAW OF RAILROAD RATE REGULATION, with Special Reference to American Legislation. By Joseph Henry Beale, Jr., and Bruce Wyman. Boston: William J. Nagel. 1906. pp. lii, 1285. 8vo.

This work will fill a general demand of the profession for a comprehensive and reliable work covering its subject. It deals with the subject from a broader standpoint than that of the Interstate Commerce Act alone. The authors consider the common law rules, the state statutory regulations, the Interstate Commerce Act, the decisions of the Interstate Commerce Commission, and the decisions of the state and federal courts. The present general demand for such a work is due to the Interstate Act Amendments of 1906, the age of all works on the subject, except those of Snyder and Judson, and the fact that they fail to deal with the common law and state statutes, which are at the very foundation of this subject.

To give sound advice, the common law, the state constitutions and statutes, and the national Constitution and statutes, must often be considered as a whole. Historically and legally, this clearly appears. In 1787 Congress was granted the power "to regulate commerce" (interstate). So far as Congress was concerned, this power remained almost unexercised until a century later, or 1887, when the first Interstate Commerce Act was passed. This act was passed because the attempts of the states to regulate the conduct of railways by the so-called Granger legislation and legislation of that character, in the early seventies, were nullified as to interstate traffic, October 25, 1886, by the necessary ruling of the Supreme Court in *Wabash Ry. Co. v. Illinois* (118 U. S. 557, 577) that regulation of interstate traffic by railroads "must be of a national character, and the regulation can only appropriately exist by general rules and principles which demand that it should be done by the Congress of the United States, under the commerce clause of the Constitution." The result of this decision was that existing state legislation regulating the railroads remained valid as to all transportation wholly confined to the state so legislating, but that, as to all commerce originating in one state or territory and passing into another, Congress alone had the power to regulate such commerce by statute.

Nor can the common law, out of which the statutes spring, be overlooked, because the Supreme Court early held: "Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally

to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." *C. N. & O. & T. P. R. Co. v. I. C. C.*, 162 U. S. 184. The traffic, however, that is not interstate, but is domestic, in large states like Texas, New York, Pennsylvania, Illinois, Ohio, and California, is enormous. It is governed by the common law, as modified by statute, and not by the Interstate Commerce Act.

The importance, then, of considering the common law, state statutes, and federal statutes, as a whole, when dealing with, or giving advice upon any phase of, this subject, is obvious, and the learned authors are to be congratulated upon being the first to issue a work covering the law upon this broad basis.

The point of view of the authors evidently is, to use their own words, that the railroad problem is to be dealt with for the present on the basis of existing statutes and decisions, whereby to "control . . . rates and practices of the railroads for public good." To throw light on the subject, they consider, among other topics, parliamentary regulation of rates, the persistence of state regulation, the theory of *laissez faire*, the growth of public employments, the power of eminent domain, the grant of exclusive franchise, monopoly as a ground for regulating public callings, requisites of common carriage, the transportation necessary, public business of common carriers, common carriers' right to compensation, primary duties of common carriers, excuses for refusal to serve, strikes, right to protect their own interests, limitations of their charges, right to return on capital, rate of return on capital, right to operating expenses, reasonableness of particular rates, elements involved in reasonable rates, classification of commodities, the effect of length of transportation upon rates, preventing discrimination between competitors and localities, Interstate Commerce Acts of England, the Granger and other state statutes, the Interstate Commerce Act of 1887, the Elkins Act, and the Interstate Commerce Act Amendments of 1906. Even the regulations of the Commission with reference to printing and publishing schedules of rates, and the procedure before the Commission, and in the courts, are considered.

The consideration of these topics is in the main most satisfactory, this being particularly true of the difficult one of discrimination in all its forms. No lawyer can examine the book upon "discrimination" without admiring the manner in which it traces the growth of the common law upon this subject, the complete lists of cases gathered in the notes, or the errors shown in a few able courts that have not kept pace with the growing common law. But this work is not infallible, even upon discrimination. For instance, the Wight case (167 U. S. 512), which holds a railroad cannot give free cartage to one shipper, just to get his shipments, while refusing it to all other shippers under like circumstances and conditions, is given prominence, and is frequently cited (§§ 724, 726, 742, and 748). The equally important unanimous decision of the Supreme Court, overruling a divided Commission, and holding that a railroad in one city to get traffic that might go to a rival may give free cartage to all passengers or freight to an outlying depot, that it may thus compete with such rival having a depot better situated, although it refuses free cartage to the same class of passengers or shippers in a neighboring competing city, where it is not so disadvantageously situated, is inadequately treated (§ 955). The Commission is cited to show that the classification of a single article, like hay, cannot be changed to increase its rate, without changing the question from one of the reasonableness of the advanced rate to one of "undue preference," but attention is not called, in that connection, to the report of the congressional committee creating the Commission, the opinion of Cooley, Chairman, in the early days of the Commission, and the early and repeated rulings of the courts that the railroads were left "free . . . to classify," if only their rates were not made unreasonable or unduly discriminatory (43 Fed. Rep. 51; 162 U. S. 184).

Naturally, the much cited "hay" case decided by the Commission (§§ 478, 556, 567, 596, 599, 917, 934, 943, 978, and 1077) was overruled by the courts (134 Fed. 942; 202 U. S. 613), and this fact should have appeared in the otherwise well-arranged, accurate, and valuable table of cases considering all kinds of freight, from "agate ware" to a "zinc slab" (§ 934). In spite of such omis-

sion, which may be due to the decision of that case by the Supreme Court about the time this work went to print, that table alone is worth the price of the work to a lawyer needing such information. This work, however, hardly puts sufficient stress upon a return load, car detention, or the difference between the cost of doing local and through freight carrying, when applied as tests to rates attacked as extortionate or discriminating. See *Ry. v. Tompkins*, 176 U. S. 178. As the Interstate Commerce Reports have demonstrated statistically for many years, if freight cars were loaded and unloaded with reasonable promptness, and return loads carried back at hardly any additional expense, the present freight car equipment of this country would be abundant wherewith to handle its freight traffic. Inability promptly to haul grain to market, or coal back, will be unheard of when railroads and shippers alike are compelled to pay a sufficient daily increasing detention charge upon cars detained to force their return to the company owning them within a reasonable time, instead of permitting shippers to use them for warehouses, or other railroads to use them in their business, because it is cheaper to use such cars than to build cars of their own. Within late years the Pennsylvania Railroad has frequently ordered from fifteen to twenty-five thousand freight cars in a single year, and yet it finds itself short of freight cars, not because it does not own enough such cars, but because they are improperly detained by shippers or other railroads. The extent of this detention may be judged from the fact that on the average a freight car travels only about thirty miles a day, whereas, if freight cars were not used for warehouses or improperly detained, this average ought to be at least doubled. Criticism, however, ought not to be made for not calling more specific attention to such facts, which are not understood or fully appreciated by a large portion of the railroad world. Some day, lawyers will learn the great importance of understanding such important railroad subjects, and a Hadley or an Acworth may be associated in the preparation of such a work, just as a doctor is quite frequently associated in preparing a work upon medical jurisprudence. Still, our authors show more insight into railroading than is common among able railroad lawyers, and from this and every other point of view their work is far superior to any other now dealing with this subject.

On the question of the constitutionality or "validity of statutes," as the authors put it, there is a reference to the principal cases, state and federal, beginning with § 1301, but it must be confessed the authors here appear rather timid, and inclined to proceed cautiously along the line of precisely what has been decided by the courts. They incline, evidently, to the position that the public good requires that the courts hold that Congress has the power to permit the Interstate Commerce Commission to fix *future* rates, although they admit that no express decision has yet been made so determining. They do not hazard the opinion that such a decision will be made, but they quote an opinion that is *obiter* pointing in that direction (§ 1339). The Supreme Court, however, did not mean to be so understood, for in a great case it has since said: "*If Congress has the power to fix such rates*,"—and upon that question we express no opinion,—it does not choose to exercise its power in that way or to that extent." *Northern Securities Co. v. United States*, 193 U. S. 343. If Congress has that power, the greatest authorities hold it cannot be delegated to any other body. COOLEY, CONST. LIM., 163 and 174, and cases.

If any serious criticism is to be made at all on so thorough and learned a work, it is that it accords almost too much authority to the decisions of the Interstate Commerce Commission, and sometimes fails to give due weight to rulings of the courts the other way. The Commission in the beginning was a very learned body, presided over by the great and learned Cooley, in the full maturity of his powers; an author and judge who had had much experience with the railroad problem upon all sides of it, as a railroad receiver. Some of the most learned legal opinions that can be found on some of the great problems involved, were written by him, and are to be found in the first volume of the Interstate Commerce Reports. Later, commissioners resigned to accept larger salaries as counsel of railroads, or as officials of railroads, and their places were filled by men seeking their places because they had not the ability or reputation

to command such positions and salaries elsewhere. The Commission has remained a very learned body of men, of great experience and of irreproachable character, but its legal ability has not continued to be of the same high standard set in the beginning by the learned Cooley and his associates. The natural result has been that, of the decisions of the Commission that have been appealed, a large proportion have been reversed. It is but fair to say that but a small percentage of the decisions have been appealed from, and therefore the large percentage of reversals merely shows that the railroad lawyers have exercised good judgment about the decisions they have advised the railroads to comply with, and the decisions they have advised them to question by appeal. Still, the decision of the Commission being unquestioned in the great majority of these cases, it follows that this work necessarily gives weight to them in stating the law of the subject.

An appendix contains the rules of the Commission, forms of proceedings before the Commission, and a valuable table (p. 1178) by which to trace amendments in the Interstate Commerce Act. A table of cases cited shows that the authors have been industrious, and the index that follows makes it easy to turn to details not readily ascertained from the good table of contents in the beginning. The state acts affecting extortionate rates, personal discrimination, undue preference, local discrimination, or regulation by state railroad commissions, or courts, can be easily found from the table of contents.

It is a pleasure carefully to examine a work that sustains such examination so well, to find it both comprehensive and acute, to note the accuracy of its learning, the convenience of its arrangement, the practical quality of its usefulness, and to commend it generally to the profession, which is bound to find such works much more necessary and useful in the future than they have been in the past.

A. M.

A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS. By Howard S. Abbott. In three volumes. Volume III. St. Paul: Keefe-Davidson Company. 1906. pp. xvi, 1981-3045.

In November the REVIEW called attention to the first two volumes of this work. As the third and final volume, containing also the analytic index and the table of cases, has now been issued, it seems fitting to add a few words concerning this unquestionably good treatise.

About six hundred pages of this volume are devoted to the completion of the text. The chapter on "Public Property" is finished, the divisions treated in this volume being "Its Control and Use" and "Its Disposition." A chapter of one hundred and sixty pages is given to the discussion of the "Liability of Public Corporations for Negligence." In the chapter "Some Public Duties" division is broadly made into "Educational Duties" and "Charitable and Corrective Duties." The final chapter concerns "Actions by and against Public Corporations"; and such actions as *mandamus*, *certiorari*, *quo warranto*, and injunction are particularly adverted to.

An examination of the table of cases shows that certainly more than forty thousand cases have been cited. The author's promise of an "index unusually full and complete" seems to have been fulfilled. The index covers two hundred pages, and seems to contain roughly between ten and twelve thousand separate headings. One difficulty with the index, however, and perhaps with the scheme of division of the whole work, is that there are not enough intermediate headings, between the chief topics into which the whole subject naturally falls, and the ten or twelve thousand headings. Although with an index of the comprehensive character of the one furnished in this work, any topic discussed in the text can be found, the grouping of the headings into such large and general divisions renders the search for the reference wanted less easy. In the table of contents references are made only to sections. A reference to pages also would have been of some assistance.

The faults that exist in this treatise are such that they can be remedied easily

in a second edition, for they are formal rather than fundamental. Mr. Abbott's treatise may be recommended to the profession as up-to-date, careful, and thorough, — one of the best of recent contributions to text-book law.

S. H. E. F.

THE LAW OF INNKEEPERS AND HOTELS, including other Public Houses, Theatres, and Sleeping Cars. By Joseph Henry Beale, Jr. Boston: William J. Nagel. 1906. pp. xviii, 621. 8vo.

It is hardly enough to say of this book that it deals with a special topic of the law in an exhaustive manner, not only collecting every case in common law lands relating to the business of innkeeping, but separating the different points arising in each case. Nor is it sufficient to add that the execution of the book is so painstaking and the detail so comprehensive as to cover not only all the contingencies discussed in the cases, but even going so far as to anticipate many problems which no case has raised as yet. To a student of the law the chief interest of this book is in the general analysis of the subject, and in its subdivision, for the law is exceptional and its incidence is uncertain. Of all the early public callings, only those of carriers and innkeepers survived the breaking down of state regulation when the mediæval system came to its end. But while common carriage always has received the treatment that its importance deserves, the similar law governing the conduct of public houses, although enforced for centuries, has never been worked out in a satisfactory manner before. The practical importance of doing this at this time is that it furnishes a body of law which may be utilized properly in dealing with the many problems of public service which modern conditions have forced to the front. It is in this aspect, as the author says in his preface, that the subject is worth such elaborate consideration. The rapid and enormous growth of the modern public service corporations has outstripped the law. It is only if the law proves adequate to grapple with every sort of violation of public duty by those who are in control of the public services that it will be safe to leave these businesses in private hands.

B. W.

LINCOLN THE LAWYER. By Frederick Trevor Hill. New York: The Century Company. 1906. pp. xviii, 332. 8vo.

This book throws new light upon the wonderful career of Abraham Lincoln. Mr. Hill has taken great pains to consult the original records, converse with as many men as possible who knew Lincoln as a lawyer, and thus he is able to make valuable deductions. Moreover, his legal training, power of analysis, and his facility as a writer fit him to produce a work worthy of the subject. He shows most conclusively that it was the long training at the bar, where Lincoln met all sorts of characters and the brightest legal talents of the day, that equipped him for the arduous duties of President in those trying times. The emphasis of this fact makes the present work a valuable contribution to the literature about the career of Lincoln.

ENGLISCHES STAATSRECHT, mit Berücksichtigung der für Scotland und Irland geltenden Sonderheiten. Von Julius Hatschek. II. Band: Die Verwaltung. Tübingen: Verlag von J. C. B. Mohr. 1906. pp. viii, 710. 8vo.

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CRUCIAL ISSUES IN LABOR LITIGATION.

II.

HITHERTO we have been considering the *primâ facie* liability of a single individual, not acting in concert with others.

How as to the *primâ facie* liability of defendants who are members of a combination?

Of course, wherever a single defendant would be *primâ facie* liable, members of a combination should be equally so.

The dispute is as to whether the members of a combination incur a greater *primâ facie* liability than a single individual. If an independent individual intentionally bringing about a certain result by a certain method is not liable, are members of a combination intentionally accomplishing the same result by the same method liable? Upon this question opinions differ. There is a dispute as to the interpretation and effect of certain decisions.¹ There is also a controversy as to the result in case the question is considered solely upon principle. All that is proposed here is: first, to give briefly some of the leading arguments which have been brought forward in discussing the matter upon principle; and then, secondly, to call attention to certain practical considerations, growing out of modern changes, which seem decisive.

If the foregoing question is answered in the affirmative, it must be on the ground that a combination, *quâ* combination, necessarily involves some feature or features intrinsically objectionable.

¹ See Mr. Cohen's "Memorandum on the Civil Action of Conspiracy," concurred in by three of his colleagues. Report of the Royal Commission on Trade Disputes, etc., 20-23; also Report, art. 61, p. 15. A majority of the Commission answer the question in the negative. Cf. 22 L. Quar. Rev. 117, and Pollock, Torts, 7 ed., 318.

There is, we think, only one feature common to all efficient combinations; namely, members agree to act (on certain subjects or within certain limits) according to the vote of a majority, or agree to obey the orders of some union official. Is this feature so objectionable as to impose upon members a civil liability for acts which would not be tortious if done by a single person acting independently?

We give Professor Dicey's statement of the question (in different phraseology), and his admirable summary of the difficulties in the way of a satisfactory solution:¹

"How can the right of combined action be curtailed without depriving individual liberty of half its value; how can it be left unrestricted without destroying either the liberty of individual citizens or the power of the government?"

"May X, Y, and Z lawfully bind themselves by agreement to act together for every purpose which it would be lawful for X, Y, or Z to pursue if he were acting without concert with others?"

"If this question be answered in the affirmative, then contractual freedom, and therefore individual liberty of action, receives what appears to be a legitimate extension, but thereupon, from the very nature of things, two results immediately ensue. The free action of X, Y, and Z is, in virtue of the agreement into which they have entered, placed for the future under strict limits, and their concerted action may grievously interfere with the liberty of some third party, T. . . . A body . . . created by combination . . . by its mere existence limits the freedom of its members, and constantly tends to limit the freedom of outsiders."

"If, on the other hand, the question before us be answered in the negative, and, in the interest of individual freedom, the law forbids X, Y, and Z to combine for purposes which they might each lawfully pursue if acting without concert, then the contractual power of X, Y, and Z, or, in other words, their liberty of action, suffers a serious curtailment."²

The same questions and arguments may be presented in other forms.

The objection to a labor combination is twofold:

- (1) It tends to limit the liberty of the insiders (the members).
- (2) It tends to increase the probability of damage to outsiders; including non-union workmen, employers, and the general public.

As to the first objection. On the one side it is said: "Free-

¹ In quoting these detached passages, the order in the book has not been followed.

² Dicey, *Law and Public Opinion*, 466, 154, 153, 155.

dom of contract means freedom not to contract and freedom to agree with others not to contract."¹

To this it is answered: "Any one may exercise a choice as to whom he will sell his goods, but he cannot enter into a contract whereby he binds himself not to sell, for in such instance he barter away his right of choice, and destroys the very right he claims, the privilege of exercising. After entering upon such agreement he is no longer a free agent."²

To this it is replied, that the argument carries too far; that it would prevent the organization of a partnership, a corporation, or a state. "It is an argument that would be pertinent against the organization of society into government. The will of the individual must consent to yield to the will of the majority, or no organization either of society into government, capital into combination, or labor into coalition, can ever be effected. The individual must yield in order that the many may receive a greater benefit."³

As to the second objection to a labor combination; namely, the probability of greater damage to outsiders.

On the one hand it is urged that what one man may do singly a number of men may lawfully do together; that what several men, each acting independently, may lawfully seek to accomplish, the same persons, acting in concert, may lawfully seek to accomplish.

In other words, "the element of combination to do an act does not make that act wrongful if the act, if done by one, would not be wrongful. . . ." ⁴ "Again, what one trader may do in respect of competition, a body or set of traders can lawfully do; otherwise a large capitalist could do what a number of small capitalists, combining together, could not do. . . ." ⁵

On the other hand it is said: "The force acquired by combination is incalculably greater than the sum of the powers so transferred to the union by each individual. . . ." In the words of Mr. Mitchell: "Six million trade unionists in the United States would not be twice, but four or five times as powerful as three millions."⁶ There is "multiplication of force by combining. . . ." ⁷

¹ The Nation, vol. 79, p. 47.

² Ellison, J., in *Ford Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 69. Of course the same argument would apply to a contract not to labor.

³ Adams, J., in *Wabash Ry. Co. v. Hannahan*, 121 Fed. Rep. 563, 571.

⁴ See 42 Am. L. Reg. (N. S.) 133, n. 19.

⁵ Lord Morris, in *Mogul, etc., Co. v. McGregor*, [1892] A. C. 25, 50. Cf. Judge Holmes, in 8 HARV. L. REV. 8.

⁶ Mitchell, *Organized Labor*, 407.

⁷ See Erle, *Trade Unions*, 2.

The increase of power by combination is "in geometrical proportion to the number concerned."¹ "... a grain of gunpowder is harmless, but a pound may be highly destructive. . . ."² A combination "is something more than the mere sum of individualities that compose it; . . . its power is something quite different from the mere aggregate of the powers of the parties to the combination. . . ."³

The commission of certain acts "by the concerted action of a number of persons materially alters their character, in this respect at least, that they thereby become more formidable, more oppressive, and more difficult to resist, and consequently more generally dangerous. . . ."⁴

It is possible that it will hereafter be more clearly seen "... that the difference between the power of individuals acting each according to his own preference and that of an organized and extensive combination may be so great in its effect upon public and private interests as to cease to be simply one of degree and to reach the dignity of a difference in kind."⁵

It is not material to consider which of these conflicting views would have prevailed in the eighteenth century. At this day the foregoing arguments against labor combinations cannot be allowed controlling force. The changes in the modes of business, brought about by the inventions coming into common use in the nineteenth century, present practical considerations which are decisive in favor of sustaining the right of laborers to combine. The law, if it were formerly otherwise, must change with alterations in the circumstances of society.⁶ These alterations have been forcibly stated by Mr. Brooks Adams

"In the nineteenth century our society broke with its past by the introduction of steam. . . . I suppose within seventy-five years social condi-

¹ Gibson, C. J., in *Com. v. Carlisle*, Brightly N. P. (Pa.) 36, 41.

² Lord Brampton, in *Quinn v. Leatham*, [1901] A. C. 495, 530.

³ 1 Eddy, *Combinations*, § 475.

⁴ Andrews, J., in *Leatham v. Craig*, Ireland [1899] 2 Q. B. & Ex. D. 667, 676. And see Prof. Wyman, in 17 Green Bag 22, 23.

⁵ Hammond, J., in *Martell v. White*, 185 Mass. 255, 260. It would seem that legislation restraining or regulating the action of combinations is at least as likely to be held constitutional as legislation restricting the liberty or regulating the conduct of a single man. See Holmes, J., in *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 409, 410; also in *Aikens v. Wisconsin*, 195 U. S. 194, 205.

⁶ See Erle, *Trade Unions*, 26, n. 1; 9, 38, 39, 47, 48, 49.

tions have changed more profoundly than they had done before since civilization emerged from barbarism, and apparently we are only at the beginning. . . . A new civilization has arisen, based on scientific discoveries and undreamed of mechanical processes, which, beside generating the trade union, develop the monopoly. . . ."¹

Combinations of capital are now a necessity. Modern business, in many of its most important forms, cannot be carried on without them.²

A very large proportion of laborers are no longer employed singly, or in small groups, by individual masters. They are now working in large masses in the employ of persons representing aggregations of capital. If, then, capital can combine, labor must equally be allowed to combine. The inevitable tendency of both classes to combine can neither be ignored nor repressed by the courts. Judge Holmes has said: ". . . the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed."³ To permit combination to capital and deny it to labor, or *vice versa*, would result in revolution, and ought to so result.⁴ ". . . the law of capitalist combination cannot permanently remain different from that of labor combination." "The law of combination, as laid down for capital, must end as affecting the law as laid down for labor, or *vice versa*. They cannot be kept in separate compartments."⁵

It is plain that workmen, if each negotiates singly with a combination of capitalists, will not attain as favorable terms, either as to wages or hours, as could be obtained by collective bargaining on

¹ Centralization and the Law, 46, 47, 48.

² Aggregations of capital usually exist under the form of a corporation. Some technical lawyer may, perhaps, set up a claim that a corporation is, in the eye of the law, a single legal person, and hence cannot be regarded as a combination. But the fictitious legal entity is composed of natural persons, and the courts will go behind the legal entity and look at the natural persons wherever justice requires.

³ Holmes, J., in the dissenting opinion in *Vegeahn v. Guntner*, 167 Mass. 92, 108.

⁴ See dissenting opinion of Caldwell, J., in *Hopkins v. Oxley Stave Co.*, 83 Fed. Rep. 912, 932, 933, 938, 939.

⁵ Prof. Ashley, in *Nat. Rev.* for March, 1906, pp. 65, 66. These sentences, though apparently written with special reference to the methods allowable to combinations, seem also applicable to the primary question of permitting the existence of combinations.

their part. Some of us are old enough to remember the days when no unions had been formed among the workmen in certain large industries owned by aggregations of capital; and we believe that the laborers did not then, in some respects, enjoy as favorable terms as they deserved.¹ Today, ". . . the mass of wage earners can no longer be dealt with by capital as so many isolated units. The time is passed when the individual workman is called upon to pit his single, feeble strength against the might of organized capital."²

Later on, under the head of "justification," the view will be advanced that a defendant is liable who, by temporal inducement, instigates an outsider (not a fellow craftsman, not an employer of the craft, and having no direct interest in the dispute) to take part in a labor conflict to the damage of the plaintiff. Why, it may be asked, does not this view necessarily imply the intrinsic unlawfulness of a combination? Must not each member of a combination be regarded as influencing his co-members to do whatever the combination does?³ We reply that there is a wide difference between thus inducing a neutral to take part in a conflict, and uniting (for purposes of conflict) with other persons having similar interests with the defendant and taking, after such union, only such action as any single man might lawfully have taken if acting independently. Granting that each member of a combination may be liable for persuading his fellow members to take action which is unlawful, *e. g.*, the breaking of a contract, yet this is entirely beside our present line of inquiry. We are now considering whether a combination is unlawful when it takes only such action as could lawfully have been taken by a single man not acting in concert

¹ This is not to be understood as implying that the employers of a former day were intentionally unfair to their workmen. Those employers were generally men of high character. But almost any man who has a practically absolute power to fix upon the terms of a business relation between himself and another person will unconsciously settle upon terms unduly favoring himself. It will not occur to him that any injustice is being done. He will be unable to put himself in the other man's place. This trait (or defect) in human nature will undoubtedly be illustrated at the present day by the terms which labor will assume to dictate to capital, whenever labor feels certain that capital has no choice but to submit. "This is the inevitable result of human infirmities from which laborers are no more exempt than capitalists." Prof. Bullock, 94 Atl. Monthly 437. Of all the maxims of the law there is none sounder than the one which says that no man ought to be judge in his own cause.

² Attorney-General Olney, as *amicus curiae*, in *Platt v. R. R.*, 65 Fed. Rep. 660; quoted in 83 Fed. Rep., at 933.

³ See 17 Green Bag 27; 42 Atl. Rep. 107.

with others. And it will be remembered that we have maintained that merely persuading another to do what he had a lawful right to do, *e. g.*, to refrain from entering into a contract, is not actionable.

Our conclusion is that the intrinsic nature of a combination furnishes no reason for holding that its members incur a greater *prima facie* liability than a single individual.

The bill now¹ pending in the British Parliament seems based on a much wider proposition; namely, that a combination (of either workmen or employers) not only incurs no greater liability than a single individual, but also enjoys greater immunity than a single individual; in fact, constituting a privileged class not liable for the torts of its agents acting within the scope of their authority. It now seems assumed that the Trades Disputes Bill will be finally enacted in the form which passed the committee stage in the House of Commons. The material portion of clause 4 is thus stated in the *Law Times* of Aug. 11, 1906:

"An action against a trade union, whether of workmen or masters, or against any members or officials thereof, on behalf of themselves and all other members of the trade union, for the recovery of damages in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court . . ."²

In the note below will be found some very pungent criticisms on this provision.³ Should such a statute be enacted in one of our states, its constitutionality would be vigorously questioned.

¹ December, 1906.

² It will be noticed that, as the clause then read, the immunity thus conferred was not even confined to acts done in the process of a trades dispute.

³ "As regards wrongful acts committed by Trade-Unions, all the laws of the realm, whether statute or common, are hereby repealed." Sir Edward Carson, quoted in *The Spectator* for Aug. 11, 1906.

"Two classes of citizens are deliberately placed above the law in respect to the main business of their lives. . . . Both men and masters, when combined in Unions, are given a charter of exemption as privileged banditti." *The Spectator*, Aug. 11, 1906.

"Clause 4, as we have said, passed [through Committee in the House of Lords] untouched, and trade unions are therefore free to commit any tortious act, which naturally will include defamation, fraud, and deceit, provided it is done for the furtherance of a trade dispute. Apparently the promoters of this measure considered, so far as these disputes are concerned, that any means will justify the end." *L. T.*, Dec. 15, 1906.

Lord James of Hereford, in the House of Lords, said that Parliament was giving trade unions the right to say: "We can take away a man's character, destroy his repu-

If a combination in its intrinsic nature is not objectionable, are labor combinations unlawful on account of aiming at monopoly; namely, monopoly of labor in a particular trade or trades?¹ That they do aim at monopoly does not seem questionable.² But monopoly is also the undoubted aim of various large combinations of capital.³ So long as the state does not suppress the capitalistic monopolies, it cannot suppress the labor monopolies without giving rise to a revolution, and so *vice versa*. At common law mercantile monopolies and labor monopolies must be on the same footing. Both must be held unlawful, or neither. They must stand or fall together. One will not be permanently suppressed unless the other is.

That capitalistic combinations will in the near future be suppressed for the sole reason that they aim at monopoly, we, for our own part, do not believe. They may and should be regulated; their doings may be brought into the light of publicity; they may be deprived of certain special privileges, they may be restrained from certain abuses, from unlawful methods of attaining their ends; but annihilation on the sole account of their tendency to create monopolies will not be their fate.

tation and living, and we have the right to do these things because we are a trade union." L. T., Dec. 15, 1906.

"If an employer who is not a member of a union has his plant destroyed through the action of a union, where will be his remedy?" L. T., Aug. 11, 1906.

"The bill in substance, conceal the matter as you will, legalizes boycotting for the benefit of unions, whether of men or of masters." Prof. A. V. Dicey, in "A Protest against Privilege," Nat. Rev. for Oct., 1906, p. 223.

"Passing now to the demand to protect the funds of trade unions against payment of damages for wrongs done by them or by their agents, it must be borne in mind that there is no difficulty whatever in doing this by declaring trusts of those funds and limiting their application to specified purposes. But this will not answer the purpose of the managers of the strikes. They want the control of the funds for promoting strikes and for compelling other persons to strike, and yet to protect those funds from the claims of persons injured by what is done in carrying out the orders of the trade unions. Anything more opposed to legal principles or good sense can scarcely be conceived. . . . The law of agency often produces hardships on employers, but that is no reason for altering it in favor of trade unions so as to produce greater injustice to others than it produces now to trade unions and other associations who carry on their operations by agents." Lord Lindley's letter in the London Times of Sept. 6, 1906; reprinted in the Boston Transcript of Sept. 22, 1906.

¹ "The attempt to force all laborers to combine in unions is against the policy of the law, because it aims at monopoly." Knowlton, C. J., in *Berry v. Donovan*, 188 Mass. 353, 359. Cf. 65 Atl. Rep. 169, 170.

² Prof. Bigelow has recently said that labor as well as capital "in combinations is in effect an agency in monopoly." *Centralization and the Law*, 8.

³ We are speaking here of combinations other than those known as public service companies, upon which the state bestows exclusive privileges in consideration of their obligation to render service to the public.

Whether the so-called "monopolies" of the present day are or are not objectionable, they certainly are very different from the monopolies of former times.¹ The old monopolies owed their success to governmental grants of exclusive privileges and were justly "odious." But many of the trade and labor monopolies of the present day do not owe their prosperity to the special favor of the government, but to the number and power of their members.² And it is open to other citizens to form rival combinations.³ "Monopoly" has ceased to mean that the government retains for itself, or sells to one person or company, the exclusive right to deal in a certain commodity or to carry on a certain kind of trading. The present so-called monopoly in trade or labor is frequently due to the enterprise of private individuals.

If we are right in supposing that mercantile monopolies will not be suppressed, then it is reasonably certain that labor monopolies will be permitted to exist.

If, on the other hand, all mercantile monopolies, in the broad modern sense, are to be overthrown, labor unions will have to share their fate; and so *vice versa*.⁴ But we do not think that at the present day combinations of either traders or laborers will be suppressed merely because they tend (or indeed aim) to create monopolies.

Thus far we have been considering the probable fate of modern monopolies at the hands of the modern common law. What will be the practical result of legislation designed to exterminate one class of monopolies and at the same time to permit the continued existence of the other class?

If the legislature should pass an act purporting in general terms to make monopolies unlawful, but expressly excepting labor monopolies, the act should, and probably would, be held unconstitutional. A similar result would follow in case a general statute expressly excepted mercantile monopolies from its operation.⁵ How if the legislature should single out certain specific kinds of mercantile monopolies and expressly prohibit them, carefully omitting all

¹ See 1 Eddy, Combinations, §§ 1, 29-35, 299-307.

² See 40 S. E. Rep. 593, *per* Brannan, J.

³ Some of the bitterest contests in labor cases have been waged between rival combinations of workmen; *e. g.*, *Allen v. Flood*, *Plant v. Woods*.

⁴ "... it is equally logical to condemn such tactics on the part of either trade-union or trust, . . ." Prof. Bullock, in 94 Atl. Monthly 436, 437.

⁵ See 2 Eddy, Combinations, §§ 909-912; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

mention of labor monopolies? Even if the act were held constitutional, the obvious inconsistency and unfairness of such legislation would prevent its efficient enforcement and it would soon become a dead letter. A similar result would follow if the legislature should specifically prohibit labor monopolies, and make no provision as to mercantile monopolies. In short, it is, practically speaking, as true of legislative action as of judicial action that mercantile monopolies and labor monopolies must be treated with equal impartiality. And it is highly improbable that a bill prohibiting *both* these kinds of monopolies would now be passed by any legislature.¹ Entertaining these views, we agree with Professor

¹ The above predictions relate to the probable action of courts and legislatures at the present moment, and are based on the assumption that most of the so-called fundamental principles of the common law are still in force, and that no essential changes will immediately be made in our written constitutions.

But it has been thought by some that the recent astounding changes in social conditions necessitate a corresponding change in the law; involving great alterations in our constitutions. It is possible to gather from the able essays of Mr. Brooks Adams, in "Centralization and the Law," that all existing legal principles must be discarded and an entirely new system evolved to meet the present emergencies. In his belief, two grim alternatives now confront us: on the one hand, despotism, either by capitalists or trade unionists; on the other hand, the establishment of state socialism (or at least state regulation of prices). See 19 HARV. L. REV. 395, 396.

Prof. Bullock, in his able article, "The Closed Shop" (94 Atl. Monthly 433, 438), speaking of the attempt of labor unions to control admission to trades and secure for themselves a monopoly of labor, says: "A little reflection should convince any one that the conditions under which a man shall dispose of his labor are of such exceeding importance to society that, if freedom is to be denied, the restrictions imposed should be determined by the government and not by any other agency. Such regulations should be just, uniform, and certain; they should not be subject to the possible caprice, selfishness, or special exigencies of a labor organization. Here, as elsewhere, we should apply the principle that, when it is necessary to restrict the freedom of labor or capital to enter any industry, the matter becomes the subject of public concern and public regulation. If membership in a labor organization is to be a condition precedent to the right of securing employment, it will be necessary for the government to control the constitution, policy, and management of such associations so far as may be requisite for the purpose in view. Only upon these terms would the compulsory unionization of industry be conceivable. Of course, before such legislation could be enacted, a change in the organic law of the states and the nation would need to be effected, for we now have numerous guarantees of the right of property in labor."

If our legislatures should enact statutes, such as have been advocated in Australia, purporting to give unionists a legal preference to employment, and such statutes should be upheld either under our present organic laws or under amendments of the Constitution, it would probably be found necessary to supplement them with a statute giving the state power to regulate admission to the unions. Such a supplemental statute might bring about a state of things like that now existing in New Zealand and New South Wales. The Industrial Arbitration Courts of those states are empowered to grant to unionists preference of employment. But "the court usually provides that

Lewis¹ that the principal danger of labor unions at the hands of the courts consists not in the fact that they are aiming toward monopoly, but rather in their methods of attempting to obtain control.

Assuming that a combination, in its intrinsic nature, is not necessarily unlawful, and assuming also that the obvious aiming at monopoly by labor combinations does not make them unlawful, still such combinations may use special methods which are unlawful. Two methods deserve particular consideration here: the expulsion of members and the imposition of fines.

Suppose that, in the agreement for forming the combination, the power of expelling members for disobedience is reserved to the majority; and suppose that thereafter a member is induced, by the threat of expulsion, to consent to some action prejudicial to a third person. Is this method of inducement unlawful as against the third person? We think not. If the members can lawfully form an organization which is to be governed by the will of the majority, then they can drop a member who refuses to abide by his agreement to obey.² But it does not follow that the combination can discipline a member if the particular action to which he refused to conform was not within the scope of the articles of association, or was intrinsically unlawful.³

Suppose that it is one of the articles of agreement that disobedient members may be heavily fined; and that thereafter the majority use the threat of imposing a heavy fine in order to induce

the union shall have preference only so long as it admits any [competent] applicant of good character to membership, without ballot or other formality likely to hamper his enrolment, upon payment of moderate fees fixed by the court. This is called enforcing the closed shop and open union." Clark, *Labour Movement in Australasia*, 174; Bulletin U. S. Bureau of Labor, January, 1905, 100; *In re The Wharf Labourers' Award*, 3 N. S. W. Industrial Arbitration Rep. 290; *Ex parte Conway*, 3 *ibid.* 362; *In re Young*, 4 *ibid.* 202.

¹ 42 Am. L. Reg. (N. S.) 160.

² A provision for expulsion was not deemed objectionable in *Macaulay v. Tierney*, 19 R. I. 255. See also 18 HARV. L. REV. 428, n. 3; Lewis, *Cas. on Restraint of Infringement, etc.*, 269, n. 3; *Beechley v. Mulville*, 102 Ia. 602.

See *Gladish v. Bridgeford*, 113 Mo. App. 726, where a by-law was upheld which not only provided for the expulsion of a member guilty of misconduct, but also provided that no member should have any business dealings or relations with an expelled member.

Cf. Ertz v. Produce Exchange, 82 Minn. 173, where a somewhat similar provision, in connection with other provisions, was held a violation of Minn. Stat., c. 359, Gen. L. 1899.

³ *Schneider v. Local Union*, 40 So. Rep. 700 (La., 1905, 6).

a minority member to join in action damaging to a third person. Is this, as against the third person, an unlawful method of inducement?

It has been held unlawful in Vermont and Massachusetts,¹ and this result seems correct. The initial agreement of the member does not make the imposition of the fine a lawful method of coercion. ". . . when the will of the majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation."²

Our next inquiry is, what constitutes a justification?

Professor A. V. Dicey has said:

"I have long been convinced . . . that the only way in which the law of Torts can be reduced to a rational and coherent system is to lay down that *prima facie* any damage done by X to A, in person, property, or character, is a tort, *but that there are a whole host of cases in which the doing damage is on various grounds justifiable, and therefore not a tort.*"³

In *Vegelahn v. Guntner*⁴ Judge Holmes said:

"It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes."

Under this head of justification, in labor cases, the question which is most commonly raised relates to the so-called "right of competition." This term "competition" has been taken over from ordinary mercantile transactions.⁵ In labor cases it might be

¹ *Boutwell v. Marr*, 71 Vt. 1; *Martell v. White*, 185 Mass. 255. Cf. *In re Young*, 4 N. S. W. Industrial Arbitration Rep. 202.

² *Munson, J.*, in *Boutwell v. Marr*, 71 Vt. 1, 8.

³ The italics are ours.

⁴ 167 Mass. 92, 105, 106.

⁵ For criticism of this term as applied to labor disputes, see Knowlton, C. J., in *Berry v. Donovan*, 188 Mass. 353, 358; and cf. *Holmes, J.*, in *Vegelahn v. Guntner*, 167 Mass. 92, 107.

more exact to speak of the defense of self-interest, or conflicts of temporal interest, or the legal limits of the "free struggle for life."¹ But, following the present legal phraseology and subject to the above explanation, we use the term "competition."

A defense grounded on the right of competition raises two main questions:

1. Who are competitors?
2. What are the legally allowable limits or methods of competition?

1. Who are competitors?

The defendant must be, in some reasonable sense, a business competitor of the plaintiff, as to the matter in question; *i. e.*, as to the matter in regard to which the defendant inflicts damage on the plaintiff. It is not enough that the defendant has an interest adverse to that of the plaintiff in some other pending matter; and *a fortiori* it is not enough that he has a grievance against the plaintiff in reference to some other past transaction. If A is sued by C for inducing C's employer to drop C, who is employed at will, A, if himself a candidate for C's position, may have the right of a business competitor. But if A induces the dropping of C from employment solely because C and he are having litigation over the title to real estate and he wishes to prevent C from earning sufficient money to carry on the law suit, A has not the rights of a business competitor.² A labor union cannot use its power to deprive one of employment, in order to compel him to pay a debt in which the union is interested.³ So merchants who wish to punish plaintiff hotel-keeper for his conduct as tax assessor are not justified in depriving him of hotel custom by threatening not to buy goods of any commercial traveller who stays at the plaintiff's hotel.⁴

It is now coming to be acknowledged that in a controversy

¹ We are here considering only conflicts of temporal interests, where the motives of both parties are selfish. Interesting questions may arise as to the justification of philanthropists who, out of concern for the welfare or morals of others, take action damaging to a business which they deem harmful to the community, but which is not carried on in violation of law. See Lord Herschell, in *Allen v. Flood*, [1898] A. C. 1, 9; also 43 Am. L. Reg. (N. S.) 103-104. And *cf.* 42 Am. L. Reg. (N. S.) 158, n. 82.

² The principle of this illustration was applied to a different set of facts in London, etc., *Co. v. Horn*, 206 Ill. 493.

³ *Giblan v. Nat'l, etc., Union*, [1903] 2 K. B. 600.

⁴ *Webb v. Drake*, 52 La. Ann. 290.

between employers and workmen in respect to wages, hours, etc., both parties have the rights of business competitors in the broad sense. There is a conflict of temporal interests between buyers and sellers of labor; in general, "whatever one party gains the other loses."¹

2. What are the legally allowable limits or methods of competition?

Excluding as clearly unlawful such methods as defamation, fraud, force, and inducement to break contracts, the question is, what are the limits of right conduct by persons engaged in economic contests? Or, more narrowly, what are the limits of legal conduct in labor disputes?

It is proposed to consider here only one group of cases, the most common and the most important; namely, where the defendant justifies on the ground that he has only been making a lawful use of his personal right to work or not to work. It is assumed, for reasons already stated, that these rights are not absolute; not so fully privileged as to make it unnecessary to show a special justification for damage intentionally inflicted by their use.

A defendant may claim that he is justified in objecting to being associated with certain workmen; or that he is justified in objecting to the source from which the employer obtains material to be worked upon, or to the disposition which the employer makes of the products of his labor. He may object to being associated with other workmen on account of their bad character, their race, their religion, their politics, their non-unionism; or it may be from his dislike to them for no reason that he can specify, any more than in the traditional instance of "Dr. Fell." But the question is not whether the defendant can be compelled to work with associates whom he dislikes, nor whether he can be sued for simply abstaining from working in their company. The case stated at the beginning of this article is one where a defendant intentionally induces a third person to refrain from entering into business relations with the plaintiff. In such a case the defendant is doing a great deal more than exercising his own right not to work. He is using that right as a lever to induce another person to exercise *his* right in a manner damaging to the plaintiff. Or, rather, the defendant is threatening to exercise his own right unless another

¹ Sir Godfrey Lushington's Report, annexed to Report of Royal Commission, p. 90. See also Caldwell, J., in *Hopkins v. Oxley Stave Co.*, 83 Fed. Rep. 912, 937-938.

person takes action damaging to the plaintiff; or, more exactly still, he is offering to refrain from exercising his own right on condition that another person will take action damaging to the plaintiff.

Does such conduct on the defendant's part exceed the proper limits of liberty, or self-defense, or economic competition?

This presents a difficult problem, but of a kind not new to the law.

If the right or interest of the defendant is to be considered by itself, as if entirely independent of any relation to other persons and without regard to the harm which the exercise of his right may cause to others, he may have a strong case. And so, conversely, may the plaintiff. In some decisions judges seem to look only at the interest of one side, and virtually ignore that of the other side.¹ But the defendant's right, the legal limit of his conduct, is not to be determined solely in view of his own interest and convenience, but in view also of the interest and convenience of others. "Neither the Mogul Case nor any other says that the promotion of one's own interest will justify any and every means by which that end can be accomplished, and the utmost that can be said about self-interest as a justification for doing mischief to others is that it is one of the circumstances to be taken into consideration in determining whether there is or is not just excuse for the wilful infliction of loss upon others."²

How can the defendant's liberty be curtailed without depriving it of the greater part of its value? On the other hand, how can the defendant's liberty be left wholly unrestricted without rendering nugatory the correlative right of the plaintiff, or seriously impairing the interests of the general public?

"We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law . . ."³

Every person has a right under the law, as between him and his fellow citizens, to reasonably full freedom in disposing of his own labor or his own capital according to his own will, so far as the exercise of this right can be made compatible with the exercise of similar rights by others.⁴

¹ See 18 HARV. L. REV. 448.

² Wills, J., in *Allen v. Flood*, [1898] A. C. 1, 48. See also *Carpenter, J.*, in *Rindge v. Sargent*, 64 N. H. 294.

³ Bowen, L. J., in *Mogul, etc., Co. v. McGregor*, 23 Q. B. D. 598, 611.

⁴ *Cf.* Erle, *Trade Unions*, 12.

"The legal right of a man to work is not absolute, but is based upon, and conditioned by, the welfare of society."¹

"The welfare of society is even more important than the welfare of organized workmen, and the welfare of each is bound up in the welfare of the other."²

"These are exercises of personal freedom which are perfectly legitimate in themselves, but which cannot be indulged in without interfering with rival exercises of personal freedom by others. One must give way to the other, and questions immediately arise as to which is to prevail, and whether the diminution of either by the exercise of the rival freedom gives rise to a right of action."³

It has been said that the principal business of the common law is the adjustment of conflicting rights.

Mr. Dicey has told us that the law of self-defense is a compromise.⁴

The same high authority has said:

" . . . the most which can be achieved by way of bringing into harmony two essentially conflicting rights [the learned author is here speaking of the right to individual freedom and the right of association] . . . is to effect a rough compromise between them. Such a practical solution of a theoretically insoluble problem is sometimes possible. That this is so is proved by our existing law of libel. It is a rough compromise between the right of A to say or write what he chooses, and the right of X not to be injured in property or character by A's free utterance of his opinions."⁵

We think that these views apply to the class of cases now under discussion. Decisions upon the sufficiency of alleged justifications must be the result of a compromise, and a rough compromise at that. And the distinctions between cases in which opposite results are reached must very often be differences of degree. " . . . in many cases the test of whether that which in itself and so far as its mere nature goes is not unlawful constitutes a cause of action or not is degree."⁶

¹ Mitchell, *Organized Labor*, 278.

² *Ibid.*, 423.

³ Wills, J., in *Allen v. Flood*, [1898] A. C. 1, 46.

⁴ Dicey, *The Constitution*, 6 ed., 437.

The law of negligence "is in its very nature a compromise." Prof. Bohlen, 40 *Am. L. Reg. (N. S.)* 83.

⁵ Dicey, *Law and Opinion in England*, Appendix 466.

⁶ Wills, J., *ubi supra*, 46.

What, in a general way, are the requisites of justification? ¹

Of course, the mere fact that a business competitor has intentionally done acts which he knew would seriously damage the plaintiff does not necessarily establish his liability.² Nor, on the other hand, does the fact that such acts were very beneficial to the defendant necessarily exonerate him.

It is submitted that there can be no justification unless the following general requisites are complied with:

1. There must be a conflict of interest between plaintiff and defendant as to the subject matter in regard to which the damage is done. Or, at least, there must be a legitimate interest of defendant to be directly served as to that subject matter.

2. The damaging act must be reasonably calculated to substantially advance the interest of the defendant.³

3. The damage resulting to the plaintiff, or to the general public (including the employer), must not be excessive in proportion to the benefit to the defendant. In other words, there must be a reasonable proportion between the benefit to the defendant and the damage to the plaintiff or to the public.⁴

4. Even where propositions 1, 2, and 3 are made out, the justification must be confined to those cases where defendant uses only his own con-

¹ In *Giblan v. Nat'l, etc., Union*, [1903] 2 K. B. 600, 618, *Romer, L. J.*, said that "it is not practically feasible to give an exhaustive definition of the word [justification] to cover all cases." *Cf. Hammond, J.*, in *Martell v. White*, 185 Mass. 255, 258.

² "But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of them." *Loring, J.*, in *Pickett v. Walsh*, 78 N. E. Rep. 753 (Mass., 1906).

³ "... even a substantial and lawful end may not warrant the use of the particular means not adapted to the accomplishment of that end." 18 HARV. L. REV. 442.

In *Hopkins v. Oxley Stave Co.*, 83 Fed. Rep. 912, 935-936, *Caldwell, J.*, said: "The grounds of the boycott are wholly immaterial in determining the right to boycott. Whether organized labor has just grounds to declare a strike or boycott, is not a judicial question." We submit that, however correct these views may be as applied to the case then before the court, and using the word "boycott" in the sense intended by the learned judge, yet they cannot be affirmed as abstract general propositions of universal application.

It has been suggested that legal excuse "should not be found in the interest or advancement of the defendant," but "should be found, if at all, in the interest of the community at large." No doubt the interest of the defendant is not the only consideration. The interest of the community is also to be regarded. But the interest of the defendant is certainly one of the circumstances to be taken into consideration.

⁴ "... an unjustifiable end, that is, an end which intentionally inflicts a damage upon a particular individual without a corresponding and compensating advantage to the one who inflicts it or to those whom he represents." 18 HARV. L. REV. 439.

duct as a lever, and therewith operates directly upon the possible employer or customer of the plaintiff. Defendant can never justify using his right to work or not to work (or any other right) as a temporal inducement to influence an outsider, or fourth person,¹ to exert pressure upon the possible employer or customer of the plaintiff.

Jeremiah Smith.

[*To be continued.*]

¹ See previous explanation of these terms, *ante*, p. 265.

THE RIGHT OF A SELLER OF GOODS TO RECOVER THE PRICE.

Dedicated to Professor Langdell.

THE English Sale of Goods Act provides in regard to the seller's right to sue for the price upon a contract of sale:¹

"(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

"(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract."

There can be no doubt of the correctness of the first provision of the foregoing section; namely, that where the property in the goods has passed and the buyer wrongfully neglects or refuses to pay for them, the seller may recover the price. Of course credit may have been given or the price may have been payable upon condition, and unless the term of credit has expired or the condition happened, no recovery can be had. In such a case the refusal of the buyer to pay would not be wrongful. The affirmative provision of the statute contains, however, the negative implication that unless the property in the goods has passed to the buyer, the seller cannot maintain an action for the price. This, indeed, expresses the general rule of the English law,² and the reason for the rule is plain. As the seller still is owner of the goods, he ought not to be given also the price for them. His damage is the difference in value between what he now has, namely, the goods, and what he would have had if the defendant had not broken his contract, namely, the price. Nevertheless, a large number of states do not follow the English law in this matter. If the reason why the property in the goods has not passed to the buyer is because

¹ § 49.

² *Atkinson v. Bell*, 8 B. & C. 277. See also *Elliott v. Pybus*, 10 Bing. 512.

the buyer wrongfully refused to take title when offered to him, according to the weight of authority, perhaps, in this country, the seller may recover the full purchase price.¹ The reason for allowing this is not always very clearly stated. The earliest decision was in a New York case,² an action for the price of a sulky built to order by the plaintiff for the defendant and refused when tendered by the plaintiff, who thereupon said he would leave it with a third person and accordingly did so. In allowing the plaintiff to recover the full price the court relied on early cases under the Statute of Frauds.³ In these early cases it was held that such a contract as the one in suit was a contract not of sale but for work and labor. This being true, the court held as a consequence that though the plaintiff did not recover the price directly, as for goods sold, the amount of recovery should be, nevertheless, fixed by the price, since that was the agreed value of the labor. The only way in which this reasoning can be answered in a wholly satisfactory way is by confessing that the authorities, under the Statute of Frauds, which have held that a contract for goods to be made to order is not a contract of sale but a contract for work and labor, are erroneous. This is now admitted in England, and the early decisions are overruled.⁴ But in many states in this country it is still law that where goods are to be made to order, which are of a special kind differing from those ordinarily made by the seller, the contract is not one of sale, but for work and labor;⁵ and in

¹ *Habeler v. Rogers*, 131 Fed. Rep. 43, 45 (C. C. A.); *Kinthead v. Lynch*, 132 Fed. Rep. 692; *Magnes v. Sioux City Seed Co.*, 14 Colo. App. 219; *Darby v. Hall*, 3 Pennewill (Del.) 25; *Ames v. Moir*, 130 Ill. 582; *Trunkay v. Hedstrom*, 131 Ill. 204, 209; *Osgood v. Skinner*, 211 Ill. 229; *Comstock v. Price*, 103 Ill. App. 19; *Dwiggins v. Clark*, 94 Ind. 49; *Rastetter v. Reynolds*, 160 Ind. 133; *Moline Scale Co. v. Beed*, 52 Ia. 307; *McCormick Machine Co. v. Markert*, 107 Ia. 340; *Bell v. Offutt*, 10 Bush (Ky.) 632, 639; *Singer Mfg. Co. v. Cheney*, 21 Ky. L. Rep. 550; *Ozark Lumber Co. v. Chicago*, 51 Mo. App. 555; *Gordon v. Norris*, 49 N. H. 376; *Black River Lumber Co. v. Warner*, 93 Mo. 374; *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Dustan v. McAndrew*, 44 N. Y. 72, 78; *Atkinson v. Truesdell*, 127 N. Y. 230; *Van Brocklen v. Smeallie*, 140 N. Y. 70; *Craig v. O'Connell*, 50 N. Y. App. Div. 339; 169 N. Y. 573; *Levy v. Glassberg*, 92 N. Y. Supp. 50 (Sup. Ct., App. Term); *Shawhan v. Van Nest*, 25 Oh. St. 490; *Rhodes v. Mooney*, 43 Oh. St. 421, 425; *Smith v. Wheeler*, 7 Ore. 49; *Reynolds v. Callender*, 19 Pa. Super. Ct. 610; *Ballentine v. Robinson*, 46 Pa. St. 177; *Pratt v. S. Freeman & Sons Co.*, 115 Wis. 648.

² *Bement v. Smith*, 15 Wend. (N. Y.) 493 (1836).

³ *Towers v. Osborne*, Str. 506; *Crookshank v. Burrell*, 18 Johns. (N. Y.) 58.

⁴ *Lee v. Griffin*, 1 B. & S. 272.

⁵ *Flynn v. Dougherty*, 31 Cal. 669; *Atwater v. Hough*, 29 Conn. 508; *Cason v. Cheely*, 6 Ga. 554; *Yoe v. Newcomb*, 33 Ind. App. 615; *Edwards v. Grand Trunk Ry. Co.*, 48 Me. 379; *Crockett v. Scribner*, 64 Me. 447; *Mixer v. Howarth*, 21 Pick. (Mass.)

other states it is held that in any case where the contract is for the sale of a commodity not in existence at the time, and which the seller is to manufacture or put in a condition to be delivered, the contract is one for work and labor.¹

It may be doubted whether the states which have adopted one or the other of these views under the Statute of Frauds would generally admit, as a consequence of their decisions, that the contracts in question should be treated as contracts for work and labor in such a sense that the price must be paid for the work rather than for the title to the property. It would indeed be unfortunate if the strained construction which has been adopted in order to evade the Statute of Frauds should be applied in other classes of cases. It should rather be said, and probably would be, that though a contract may not be a contract of sale within the meaning of the Statute of Frauds, if it is contemplated that special work and labor by the seller shall go into it, it is, nevertheless, a contract of sale for other purposes. There can, in fact, be no doubt that the price is promised for the completed article, not for the work and materials which have gone into its manufacture. The reason, therefore, on which *Bement v. Smith*² was rested cannot be supported. It is not generally adopted today,³ and the New York court has long ceased to rest the buyer's right to the price on this reason. A later New York decision⁴ laid down the rule broadly that

205; *Goddard v. Binney*, 115 Mass. 450; *Turner v. Mason*, 65 Mich. 662; *Russell v. Wisconsin Ry. Co.*, 39 Minn. 145; *Brown & Haywood Co. v. Wunder*, 64 Minn. 450; *Pitkin v. Noyes*, 48 N. H. 294; *Prescott v. Locke*, 51 N. H. 94; *Pawelski v. Hargreaves*, 47 N. J. L. 334; *Mechanical Boiler Co. v. Kellner*, 62 N. J. L. 544; *Roubicek v. Haddad*, 67 N. J. L. 522; *Orman v. Hager*, 3 N. M. 331; *Puget Sound Depot v. Rigby*, 13 Wash. 264; *Meincke v. Falk*, 55 Wis. 427; *Hanson v. Roter*, 64 Wis. 622; *Gross v. Heckert*, 120 Wis. 314; *Williams-Hayward Co. v. Brooks*, 9 Wyo. 424. See also *Sawyer v. Ware*, 36 Ala. 675; *Scales v. Wiley*, 68 Vt. 39.

¹ *Bennett v. Nye*, 4 Greene (Ia.) 410 (*cf.* *Mighell v. Dougherty*, 86 Ia. 480; *Lewis v. Evans*, 108 Ia. 296; *Dierson v. Petersmeyer*, 109 Ia. 233); *Eichelberger v. McCauley*, 5 Har. & J. (Md.) 213; *Bagby v. Walker*, 78 Md. 239; *Deal v. Maxwell*, 51 N. Y. 652; *Higgins v. Murray*, 4 Hun (N. Y.) 565, 73 N. Y. 252; *Parsons v. Loucks*, 48 N. Y. 17; *Cooke v. Millard*, 65 N. Y. 352; *Hinds v. Kellogg*, 13 N. Y. Supp. 922; *aff.* 133 N. Y. 536; *Deal v. Maxwell*, 51 N. Y. 652; *Talmadge v. Lane*, 17 N. Y. Misc. 731, 41 N. Y. Supp. 413. See also *Roubicek v. Haddad*, 67 N. J. L. 522; *Warren Co. v. Holbrook*, 118 N. Y. 586, 593; *Joy v. Schloss*, 15 Abb. N. C. (N. Y.) 373; *Winship v. Buzzard*, 9 Rich. (S. C.) 103; *Suber v. Pullin*, 1 S. C. 273; *Mattison v. Wescott*, 13 Vt. 258; *Ellison v. Brigham*, 38 Vt. 64; *Forsyth v. Mann*, 68 Vt. 116; also *Hientz v. Burkhard*, 29 Ore. 55.

² 15 Wend. (N. Y.) 493.

³ It was, however, followed in *Ballentine v. Robinson*, 46 Pa. St. 177.

⁴ *Dustan v. McAndrew*, 44 N. Y. 72.

any seller might at his option store or retain the property for the vendee and sue him for the entire purchase price. This doctrine is stated broadly as applicable not only to cases where the title has passed, but to cases where the buyer's default consists in not letting it pass.¹ This decision and the rule laid down therein have been very influential in other jurisdictions, and cases which refuse to confine the seller to the difference between the contract price and the market price generally go back to this New York decision for their foundation.

Of course, if the seller is entitled to the price, the buyer must be entitled to the goods. At what moment the title passes to him is not much discussed in the decisions, but the statement of the rule that the seller may store or retain the property for the buyer implies that when the seller deposits the goods with a third person for the buyer, or gives notice to the buyer by suing for the price or otherwise, that he himself is holding the goods for the buyer, either the title thereupon passes, or, what amounts to the same thing, the rights of the parties will subsequently be adjusted as if it had passed at that time.² The remedy thus allowed is neither more nor less than specific performance of the contract. In a court of equity a contract for a purchase of land is enforced by a decree ordering the defendant to pay the price upon the transfer of title. In the case of a sale of goods the New York court and other courts following its rule allow the seller by force of his own expressed volition to make the buyer owner in spite of the buyer's dissent, and thereupon to recover the price.

Some states restrict the application of the New York doctrine to

¹ "The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself: (1) he may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or, (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price." *Dustan v. McAndrew*, 44 N. Y. 72, 78, *per* Earl, C. The same statement is expressly applied to executory contracts of sale in *Ackerman v. Rubens*, 167 N. Y. 405.

² It would follow that thereafter the risk of loss must be upon the buyer, and this is borne out by the reasoning in *Neal v. Shewalter*, 5 Ind. App. 147, 154. The property in question in that case after having been wrongfully refused by the buyer was destroyed by fire. The court said the goods "remained the property of the [sellers]. They did not place themselves in the position of bailees for the [buyers]. Therefore they would be entitled only to the difference between the contract price and the market price at the time and place at which the [buyers] became in default."

cases where the goods contracted for are of a peculiar kind, not readily salable on the market and as to which, therefore, a market price cannot readily be fixed.¹ The doctrine, whether in its broadest or most restricted form, at first sight strikes most legal theorists as both anomalous and erroneous. It is generally condemned by the text-writers.² But the rule in its more limited form should commend itself. The very fact of the wide adoption of a doctrine which is, and is known to be, contrary to the rule previously prevailing shows that the new doctrine must commend itself to the sense of justice of the courts, and if the matter be looked at broadly as one of justice rather than one of technical remedies permitted by our law, it will be hard to find a reason why the seller of land should be allowed to force the buyer to take it and pay the price while the manufacturer of goods for a special and peculiar order should not be. In such a case the seller may urge the very reason which courts of equity have habitually given for allowing specific performance of contracts in regard to sales of land, the inadequacy of damages. It is true the remedy is not mutual. The buyer is without specific redress if the seller refuses to make the goods, or refuses to give them up if he has made them. But the buyer is much less in need of the remedy of specific performance in this kind of case than the seller. If the seller does not manufacture the goods, the buyer can ordinarily do better by getting some one else to manufacture them than he could do by trying to force the seller to manufacture against his will. If the goods are already manufactured, the seller will rarely be disposed to withhold them from the buyer. The very fact that the goods are of a special kind and have no general market value will preclude the seller from making any other disposition of them. Doubtless cases could be put, however, where the buyer is in need of specific performance, but the fact that he is allowed no such right either at law or in equity ought not to debar the seller from specific redress. The requirement of mutuality has perhaps been pushed to the extreme of a technicality in equity.

It is not, however, chiefly because the rule is unjust that fault is found with it; it is rather because it seems at variance with estab-

¹ *Kinthead v. Lynch*, 132 Fed. Rep. 692; *Black River Lumber Co. v. Warner*, 93 Mo. 374; *Ozark Lumber Co. v. Chicago Lumber Co.*, 51 Mo. App. 555; *Gordon v. Norris*, 49 N. H. 376; *Smith v. Wheeler*, 7 Ore. 49; *Ballentine v. Robinson*, 46 Pa. St. 177.

² *Mechem, Sales*, § 1694; *Burdick, Sales*, 2 ed., § 364; *Tiffany, Sales*, § 103. Benjamin does not refer to it.

lished legal principles. It seems anomalous that the seller should be able to force title upon the buyer by simply electing to do so. This is probably the reason why many jurisdictions reject the New York doctrine and follow the English law.¹ Is it, however, so anomalous as is sometimes supposed for one party to an obligation to enforce it specifically against the other without the aid of a court of equity? Is it not constantly done in cases where rescission of title to personal property is allowed as a remedy? If a buyer obtains by fraud the seller's assent to transfer the ownership of goods, there is no doubt that the buyer gains title thereby.² Yet there is no more doubt that the seller may regain his title by his own election so to do. Not only may he bring trover,³ but he may also bring replevin.⁴ It can hardly be doubted that if the seller could regain possession of the goods peaceably without the aid of a court, he might do so, and would thereby be revested with title.⁵ This is nothing else than specific enforcement of the obligation of the fraudulent buyer to return the title wrongfully acquired by him. Moreover the seller must, as a condition of recovery, return to the buyer what-

¹ *Grier v. Simpson*, 8 Houst. (Del.) 7; *John Deere Co. v. Gorman*, 9 Kan. App. 675; *Moody v. Brown*, 34 Me. 107; *Tufts v. Grewer*, 83 Me. 407; *Greenleaf v. Gallagher*, 93 Me. 549; *Greenleaf v. Hamilton*, 94 Me. 118; *Tufts v. Bennett*, 163 Mass. 398; *McCormick Machine Co. v. Balfany*, 78 Minn. 370; *Funke v. Allen*, 54 Neb. 407; *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 536; *Jones v. Jennings*, 168 Pa. St. 493; *Puritan Coke Co. v. Clark*, 204 Pa. St. 556 (but see *Ballentine v. Robinson*, 46 Pa. St. 177); *Gammage v. Alexander*, 14 Tex. 414; *Tufts v. Lawrence*, 77 Tex. 526; *Rider v. Kelley*, 32 Vt. 268; *American Leather Co. v. Chalkley*, 101 Va. 458, 463. See also *Morris v. Cohn*, 55 Ark. 401; *First Bank v. Ragsdale*, 171 Mo. 168, 185; *Dowagiac Mfg. Co. v. Mahon*, 101 N. W. Rep. 903 (N. D.).

² Thus, if the buyer resells the goods to a purchaser for value without notice, the latter gets an indefeasible title. *Leask v. Scott*, 2 Q. B. D. 376; *Williamson v. Russell*, 39 Conn. 406; *Walp v. Mooar*, 76 Conn. 515, 517; *Hall v. Hinks*, 21 Md. 406; *National Bank v. Baltimore & Ohio R. R.*, 59 Atl. Rep. 134; *Goodwin v. Mass. Loan and Trust Co.*, 152 Mass. 189, 198; *Root v. French*, 13 Wend. (N. Y.) 570. But if the buyer had acquired merely possession by fraud, not even a purchaser for value without notice could get title. *Baehr v. Clark*, 83 Ia. 313; *Rohrbrough v. Leopold*, 68 Tex. 254. So the seller may "affirm" the sale and sue for the agreed price, — a remedy which proceeds upon the assumption that title is in the buyer. See *Schwartz v. McCloskey*, 156 Pa. St. 258, 264.

³ *Thurston v. Blanchard*, 22 Pick. (Mass.) 18; *Moody v. Drown*, 58 N. H. 45; *Baird v. Howard*, 51 Oh. St. 57, 22 L. R. A. 846.

⁴ *John V. Farwell Co. v. Hilton*, 84 Fed. Rep. 293; *Cox Shoe Co. v. Adams*, 105 Ia. 402; *Hall v. Gilmore*, 40 Me. 578; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467; *Field v. Morse*, 54 Neb. 789; *Baker v. McDonald*, 104 N. W. Rep. 923 (Neb.), 1 L. R. A. (N. S.) 474; *Sisson v. Hill*, 18 R. I. 212, 21 L. R. A. 206.

⁵ *Wheelden v. Lowell*, 50 Me. 499.

ever was paid for the goods.¹ Generally the buyer will refuse to receive it, and the seller may then tender it and recover as if he had actually returned it.² Let it be supposed the price was itself in the form of a chattel. When the defrauded seller tenders back this chattel, and the tender is refused, and the seller thereupon is allowed to recover what he had parted with or its full value, the relief necessarily proceeds upon the assumption that the seller has restored title to the buyer in the chattel given as the price, without the buyer's assent.³ If the property in question is land and the buyer has fraudulently acquired a conveyance, the seller must go into equity in order to get a reconveyance, but in the case of a sale of goods he can regain title to what he has parted with and revest the buyer with title to the consideration without this procedure.

The same rules of law apply where rescission of title is allowed for other reasons than for fraud, — as mistake, duress, or infancy. So if an infant pleads his infancy in order to prevent recovery of the price of goods, the seller may replevy the goods.⁴ This necessarily means that the seller by his own election enforces specifically the obligation of the infant to return the goods which he will not pay for. To say that the infant's plea is an assent to retransfer the goods is to state a fiction. It is immaterial whether the infant assents or expressly dissents.

The remedies allowed to an unpaid seller after the title has passed to the buyer, other than the right to recover the price, illustrate the same principle. The seller may by his own act take title out of the buyer and revest it either in himself or in a third person to whom a resale of the goods is made. The English law formerly denied this,⁵ but the Sale of Goods Act now allows the right of resale.⁶ As yet the law of England does not allow a rescission of

¹ Save in exceptional cases. See 21 L. R. A. 206, n., and 1 L. R. A. (N. S.) 474.

² *Barnett v. Speir*, 93 Ga. 762; *Porter v. Leyhe*, 67 Mo. App. 540. See also *Milliken v. Skillings*, 89 Me. 180.

³ In *Nolan v. Jones*, 53 Ia. 387, one party to an exchange, induced by fraud, was allowed replevin to recover his goods. The court says that because of the fraud the transaction was "void," but also says the plaintiff might have "affirmed" it. To the same effect is *Porter v. Leyhe*, 67 Mo. App. 540. Cf. *Barnett v. Speir*, 93 Ga. 762; *Haase v. Mitchell*, 58 Ind. 213, also cases of exchange.

⁴ *Badger v. Phinney*, 15 Mass. 359.

⁵ *Martindale v. Smith*, 1 Q. B. 389; *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127.

⁶ § 48 (3). "Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and

the title otherwise than by resale, but the right of resale necessarily involves a transfer of title without the assent of the owner of the property. It does not help the matter to imply a fictitious agency calling the seller the agent of the buyer to resell. In this country the seller's right not simply to resell the goods, but to rescind the transfer of title and take title back to himself, is well recognized.¹ Thus, if the seller resells the goods for a greater price than that fixed by the original bargain, the original buyer is not entitled to the difference. It is the profit of the seller since he was justified in regarding the goods as his own.² The seller in thus acting is foreclosing his lien. In case he chooses to resell on account of the buyer it is a foreclosure by sale. In case he elects to retake title to himself it is a strict foreclosure. In the case of land a bill in equity might be necessary. In the case of goods the result is reached more summarily.

In the converse case, where the buyer seeks to rescind a transfer of title to him, whether for fraud, mistake, or breach of warranty, the same rule again prevails. The buyer may, if he chooses, recover the price that he has paid, and is not obliged to sue for the difference in value between the property which he has acquired and the price which he paid. He recovers the price in full if he elects to do so. This election necessarily operates as a transfer of the title back to the seller. The doctrine which permits one whose goods have been converted to "waive the tort" and sue for the value of the goods, or the price for which the converter has sold them, is another case where a plaintiff transfers title by his own action, without any assent of the defendant.³ Indeed, even where trover is brought for the conversion, it is impossible to justify the existing rule of damages which gives the injured party the full value of the goods except on the theory that the title to the goods is transferred to the buyer. If the plaintiff were regarded as continuing the owner of the goods, he should recover damages equal in amount only to the loss which he suffered by the deprivation of possession

recover from the original buyer damages for any loss occasioned by his breach of contract."

¹ See cases cited *ante*, p. 364, n. 1.

² *Warren v. Buckminster*, 24 N. H. 336; *Bridgford v. Crocker*, 60 N. Y. 627. See also *Strickland v. McCulloch*, 8 N. S. W. 324. So the Indian Contract Act, § 107, provides that the lien-holder, though title has passed, may resell the goods, and though "the buyer must bear any loss," he "is not entitled to any profit which may occur on such resale."

³ See Keener, *Quasi-Contracts*, 159.

of the property. If the property were destroyed, of course this would equal the value of the goods; but if the property still remained in existence, it might well be a comparatively small amount.¹

A case which presents a still closer analogy to that primarily under discussion arises in the law of conditional sales. As will be seen hereafter, in such sales the buyer may recover the full price, though title to the goods has not been transferred. It is further generally held that if the seller sues for the price, he cannot thereafter reclaim the goods, although according to the contract the title was to remain in the seller until the price was paid.² Thus the seller loses a title which by the contract was still to remain in

¹ It is actually held that title to the goods passes to the defendant either when judgment is given for the plaintiff or when the execution upon the judgment is satisfied. See *Miller v. Hyde*, 161 Mass. 472. So late a time as either of these days seems somewhat inconsistent with the rule of damages, because in order to justify full damages it would seem on theory that the plaintiff must have had a cause of action justifying such damages at the time the action was brought, an assumption which can only be sustained as a universal rule on the theory that title to the property had passed to the defendant at that time. If we take the time of transfer of title, however, to be the later period when judgment is rendered or execution satisfied, there is still a case where title is transferred from one party to the other without the assent of both parties and without the aid of a court of equity.

² *Parke Co. v. White River Co.*, 101 Cal. 37; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353; *Crompton v. Beach*, 62 Conn. 25; *Smith v. Gilmore*, 7 D. C. App. 192; *Richards v. Schreiber*, 98 Ia. 422; *Bailey v. Hervey*, 135 Mass. 172; *Whitney v. Abbott*, 191 Mass. 59; *Button v. Trader*, 75 Mich. 295; *Alden v. Dyer*, 92 Minn. 134; *Dowagiac Mfg. Co. v. Mahon*, 101 N. W. Rep. 903, 905 (N. D.). See also *Smith v. Barber*, 153 Ind. 322. These decisions seem erroneous and are opposed to the following: *Forbes Piano Co. v. Wilson*, 144 Ala. 586; *Jones v. Snider*, 99 Ga. 276; *Dederick v. Wolfe*, 68 Miss. 500; *McPherson v. Acme Lumber Co.*, 70 Miss. 649; *Campbell Press Co. v. Rockaway Pub. Co.*, 56 N. J. L. 676. See also *Thomason v. Lewis*, 103 Ala. 426; *Fuller v. Byrne*, 102 Mich. 461; *Matthews v. Lucia*, 55 Vt. 308. The error in the decisions first cited is this, — the reservation of title by the seller is for the purpose of securing the price. The transaction is in its essence the same as a chattel mortgage given by the buyer on the purchased property to secure the price. Just as the mortgagee may sue for the price and also foreclose his mortgage upon the property, so the seller in a conditional sale should be allowed to sue for the price and also reclaim the property, not as his own, but for the purpose of foreclosing it; that is, — for the purpose of endeavoring to realize from it the full amount due him. Of course, as in the case of a mortgage, the seller should be restricted to satisfaction of his claim with interest. If, therefore, judgment for the price is satisfied in part, this should be credited, and any excess over the amount due, which may be acquired by seizing and disposing of the goods, should be returned to the buyer. Though the cases cited at the beginning of this note may be erroneous for the reason just given, the error does not relate to the matter for which the cases are here cited; namely, the power of a court of law to treat an election on the part of the plaintiff as effectual to transfer title to property to the defendant.

him, and the buyer acquires it when and because the seller elects to sue for the price. A further illustration is found if the seller under a conditional sale attaches or levies execution upon the property sold. Even in jurisdictions which do not regard the mere act of suing for the price a binding election, such a seizure debars the seller from thereafter reclaiming the property. In effect it transfers title to the buyer.¹ The same rule is applied in the case of chattel mortgages. Even in jurisdictions where it is held that a mortgage vests a legal title in the mortgagee, attachment of the goods by him deprives him of all rights of ownership in the property.²

A somewhat analogous doctrine of self-help exists in the law of executory contracts. If one party to such a contract is guilty of a material breach, the other party may elect to rescind it. Courts have sometimes endeavored to make out mutual assent by calling the breach or repudiation of the wrongdoer in such a case the offer to rescind; but this is an obvious fiction. In truth, the wrongdoer is under an obligation to permit the rescission of the contract, and the injured party is allowed to enforce the obligation by treating the contract as rescinded without the aid of a court.³

The illustrations which have been given show that the allowance of what is in effect specific performance of an obligation, or the transfer of title at the election of one party without the assent of the other without resort to a court of equity, is not unusual in our law, and most persons would hesitate to say that in these illustrative cases the plaintiff should be denied the specific execution of the obligation due him. Courts of equity have confined the right of specific performance of affirmative obligations in regard to personal property so narrowly that either injustice must be done or the necessary remedy must be sought in another way. Indeed, it may be questioned whether the remedy of a bill in equity would be so satisfactory in the case of ordinary sales of goods as the shorter cut afforded by courts of law. If the proper equitable remedy cannot be adequately reproduced by the

¹ *Tanner Engine Co. v. Hall*, 89 Ala. 628; *Montgomery Iron Works v. Smith*, 98 Ala. 664; *Fuller v. Eames*, 108 Ala. 464; *Albright v. Meredith*, 58 Oh. St. 194.

² *Libby v. Cushman*, 29 Me. 429; *Whitney v. Farrar*, 51 Me. 418; *Evans v. Warren*, 122 Mass. 303; *Dyckman v. Sevatonson*, 39 Minn. 132; *Haynes v. Sanborn*, 45 N. H. 429.

³ See Wald's *Pollock, Contracts*, 3 ed., 339 *et seq.* In France and Louisiana the injured party brings an action in court for the rescission of the contract.

procedure of a court of law, it is doubtless wrong for it to invade the province of equity. Likewise the results which equity with its elastic decrees reaches in analogous cases must be taken as the standard of permissible relief, and it is only to reach such results by the judgment of a court of law or by permitting an injured person to work out his own redress, that relief in these summary ways should be allowed. But where the same result can be reached at law as in equity, the court of law not only may invade the province of equity, but it should do so if the rule of equity is more just. Especially should it do so if the court of equity for technical reasons refuses to take jurisdiction of the case, and the court of law must give the only available remedy. Where a seller has prepared goods of a special and peculiar kind under a contract and the buyer wrongfully refuses to take them, this reasoning is particularly applicable. Damages are not an adequate remedy for the seller. He does not want the goods himself and he cannot resell them readily, yet they are not without value, and if he is confined to the difference between their value and the contract price, a substantial diminution from the price would be made. Further, a court of equity will not take jurisdiction of the case. Though there is the same reason for doing so as exists in the case of a contract for the sale of land, so far at least as the seller's side of the bargain is concerned, courts of equity have been indisposed to extend their jurisdiction to such cases.¹

It is worth noticing that in the civil law the buyer is entitled to recover the full price when the seller is in default. By the classical civil law title never passed until delivery of the goods.² So that in any case to allow the buyer to recover the full price when the seller refused to accept delivery necessarily involved recovery of the price by one who had not transferred the title.³ The Ro-

¹ It should perhaps be said, in order to prevent misapprehension, that the rule contended for is only applicable where the contract has been broken by the buyer after the goods have been procured or manufactured. If the buyer repudiates his contract or countermands his order before the goods have been manufactured or procured by the seller, he ought not to be allowed, and generally is not allowed, to enhance the damage of the buyer by manufacturing or procuring the goods. Wald's *Pollock, Contracts*, 3 ed., 349.

² Moyle, *Contract of Sale in the Civil Law*, 110.

³ Pothier, *Contract of Sale*, § 280: "When the contract contains no provision for credit, the seller may immediately commence this action (*actio venditi*) against the buyer upon making the offer which he ought to do to deliver the thing, provided it is not already delivered. If after the contract the thing ceases, without the fault of the seller, to be in a situation to be delivered, the seller is not thereby deprived of his right

man law, indeed, went further than this. Even though the goods had been destroyed by accident before delivery, and therefore before transfer of title, the risk was thrown on the buyer, and the seller was allowed to recover the price.¹ It may therefore be urged that the Roman law virtually made the promises of buyer and seller independent, and that as such a doctrine is not only clearly inconsistent with our law, but also with fundamental principles of justice, no desirable suggestion or analogy can be derived from that system of jurisprudence. The rule of the classical Roman law in regard to risk is, however, generally abolished today in Europe;² and the recognition of the dependency of the promises in a bilateral contract is as completely recognized, perhaps more completely recognized, on the continent of Europe than in England.³ But in spite of this, the rule in regard to the recovery of the price persists. This is true in France.⁴ So the old German commercial code, which was in force not simply in Germany but also in Austria, and is still in force in the latter country, provides: "If the buyer is in default in accepting the goods, the seller may deposit them, at the risk and expense of the buyer, in a public warehouse or otherwise in a safe manner."⁵ The new commercial code in force throughout the German Empire since 1897 copies this provision.⁶ Even in Scotland the same rule prevails today, for the rule of the civil law is preserved in the Sale of Goods Act.⁷

of commencing his action for the payment of the price. But while the seller is in default in delivering the thing sold, he cannot demand the price of it."

¹ See 9 HARV. L. REV. 72.

² See 9 HARV. L. REV. 76.

³ See 13 HARV. L. REV. 80.

⁴ Code Civil, art. 1138, 1652; 2 Troplong, n. 603; Massé et Vergé, n. 10.

⁵ Handelsgesetzbuch, § 343.

⁶ Handelsgesetzbuch of 1897, § 373. In commenting upon this provision Lehmann and Ring say in their *Kommentar zum Bürgerlichen Gesetzbuche und seinen Nebengesetze* (Berlin, 1901), ii, 101, "Since the seller is no longer responsible for the goods, he acquires the right to the price and must only make allowance for what he saves in consequence of being freed from performance or what he acquires or wrongfully fails to acquire through other application of his labor. He can also recover from the buyer indemnity for the necessary expenses for the care and custody of the goods. He must even be allowed a claim for storage if he is a merchant."

⁷ "§ 49. (3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be." Chalmers, in his annotation of the section, quotes as the authority for this provision, *Mercantile Law Commission*, 1855, second report, p. 47: "The seller may sue the purchaser for the price and interest, whether the goods sold are specified or not, provided goods according to the contract have been tendered to the purchaser."

The second sub-section of the English statutory provision relating to the recovery of the price provides that the price may be recovered where it is payable on a day certain, irrespective of delivery, although the property in the goods has not passed. It is a matter of construction in every case whether the price is payable on a day certain, irrespective of delivery. The contract will rarely so provide in terms, and the proper construction must generally depend upon the relative time fixed by the contract for performance on one side and the other. The rules of construction applicable here are the same which are applied to contracts generally. Contracts to sell, indeed, present a typical case for the application of the doctrines of implied conditions. Unless there is ground for a contrary supposition, courts will assume that the payment of the price and the delivery of the goods were intended to be concurrent acts, and the obligation of each party to perform will be dependent upon the simultaneous performance by the other party.¹ Even though a date be fixed for the performance on one side, and no date fixed for the counter-performance, the same principle will be applied unless there is something in the contract or surrounding circumstances to show that the performance for which the time was not fixed could not in its nature be given, or was not intended to be given on the same day as the performance for which the time was fixed.² If, however, different times are fixed for the payment of the price and the delivery of the goods, the general rule, undoubtedly, is that adopted from Lord Holt's opinion in *Thorpe v. Thorpe*,³ that the act which is by the contract to be performed first is absolutely due on that day, while the performance which is to take place on a later day is not due unless as a condition precedent the prior performance has been rendered. Generally, if performance by either buyer or seller is to precede the performance

¹ *Cole v. Swanston*, 1 Cal. 51; *Merrill Furniture Co. v. Hill*, 87 Me. 17; *Haskins v. Warren*, 115 Mass. 514, 533; *Southwestern Freight Co. v. Stannard*, 44 Mo. 71; *Whitman Agricultural Ass'n v. National Ass'n*, 45 Mo. App. 90; *La Mont v. La Fevre*, 96 Mich. 175; *Walter v. Reed*, 34 Neb. 544; *Chapman v. Lathrop*, 6 Cow. (N. Y.) 109; *Wabash Elevator Co. v. First Nat'l Bank*, 23 Oh. St. 311; *Cleveland v. Pearl*, 63 Vt. 127.

² *Morton v. Lamb*, 7 T. R. 125; *Brennan v. Ford*, 46 Cal. 7, 16; *Sanborn v. Shipherd*, 59 Minn. 144; *Dunham v. Pettee*, 8 N. Y. 508.

³ 12 Mod. 455. Lord Holt was considering only when the word "for" or its equivalent made a promise conditional, but the rules he laid down were adopted in *Serjeant Williams' notes to Pordage v. Cole*, 1 Wms. Saund. 3191, as applicable to all mutual promises irrespective of the word "for." Lord Mansfield's decision in *Kingston v. Preston*, 2 Dougl. 689, clearly warranted this extension.

of the other, it is the seller's performance that will come first. It is common for sellers to give credit for the price. It is not common for buyers to give credit for the goods. It may, however, happen in a particular case that the buyer promises to pay the price before acquiring the title or even the possession of the goods. In such a case the provisions of sub-section (2) are applicable, and the seller is by the terms of the contract entitled to recover the price.

Apparently under the English statute this right to recover the price would not depend in any way upon the prospective performance, or failure to perform, of the seller. There can be no doubt that by agreeing to pay the price before the transfer of the goods the buyer agrees to take the risk of the seller's subsequent performance under ordinary circumstances. Let it be supposed, however, that it becomes evident, before the time for payment of the price, that the seller will not perform when the day comes for the delivery of the goods. It is a manifest injustice if the buyer must pay the price knowing that all he will get is a right of action against the seller. It is true the buyer has agreed positively to pay on the day, but he made that agreement on the assumption that the seller was going to perform subsequently, an assumption which is no longer justified. The cases, therefore, rightly excuse the buyer from his obligation to pay the price under these circumstances. The ground of the excuse is, in substance, failure of consideration, although the consideration of the buyer's promise is not the seller's performance but the seller's promise. The parties contemplate a double exchange. They exchange promises when the contract is made and they plan to exchange performances later. The fact that the performances are not to be simultaneous does not alter the fact that one performance is regarded as the price or exchange of the other. Accordingly there is in justice as good reason for excusing the party from whom the prior performance is due, when he will not get the subsequent performance from the other party, as there is for excusing the latter party when default of his co-contractor has already taken place. Prospective failure to receive the promised exchange, if the prospect is sufficiently certain, therefore should be, and in fact is, held by the courts to be as good a defense as a failure which has actually occurred.

Several classes of cases illustrate this. If the party from whom the second performance is due becomes insolvent, this is an excuse

to the other party.¹ So a voluntary transfer to a third person of the property to which the contract related is an excuse, and rightly, inasmuch as this indicates generally both an inability and an unwillingness to perform.² It has been suggested in some cases that the seller might regain the property before the time for performance and, therefore, the buyer should not be excused.³ It is always a question of fact what the prospects for the re-acquisition of the property by the seller are, but in an ordinary case it would seem that the disposition of the property by the seller both indicates a repudiation of his obligation, and also puts him in a position where, even though willing to perform subsequently, he could not do so unless the third person who bought the property consented to resell it. This is a contingency not within the original contemplation of the parties and the risk of which the buyer ought not to be compelled to run. For the same reason any repudiation on the part of the party from whom the subsequent performance is due, will excuse the party from whom the prior performance is due.⁴ The whole doctrine of allowing suit on a contract before the time for performance has come, in case of repudiation, was based in the leading decision on the necessity of giving the innocent party an excuse for not perform-

¹ *Ex parte* Chalmers, L. R. 8 Ch. 289; *Bloomer v. Bernstein*, L. R. 9 C. P. 588; *Morgan v. Bain*, L. R. 10 C. P. 15; *Mess v. Duffus*, 6 Comm. Cas. 165; *Re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108; *Robertson v. Davenport*, 27 Ala. 574; *Brassel v. Troxel*, 68 Ill. App. 131; *Rapplee v. Racine Seeder Co.*, 79 Ia. 220; *Hobbs v. Columbia Falls Co.*, 157 Mass. 109; *Lennox v. Murphy*, 171 Mass. 370, 373; *Pardee v. Kanady*, 100 N. Y. 121; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435; *Diem v. Koblit*, 49 Oh. St. 41; *Dougherty Bros. v. Central Bank*, 93 Pa. St. 227; *Lancaster Bank v. Huver*, 114 Pa. St. 216. See also *Sale of Goods Act*, §§ 18, 41. *Cf. Ex parte* Polard, 2 Low. (U. S.) 411; *Stokes v. Baars*, 18 Fla. 656; *Chemical Nat'l Bank v. World's Columbian Exposition*, 170 Ill. 82; *C. F. Jewett Pub. Co. v. Butler*, 159 Mass. 517; *Bank Commissioners v. New Hampshire Trust Co.*, 69 N. H. 621. In all these cases the seller's performance was first due, but there can be no difference in result when the buyer is first to perform.

The German Civil Code provides, § 321: "one who is bound to the prior performance in a bilateral contract, if the solvency of the other party is materially diminished after the formation of the contract, by means of which the claim for the subsequent counter-performance is endangered, may refuse to perform the obligation due from him until the counter-performance is rendered or security for it furnished."

² *Fort Payne Co. v. Webster*, 163 Mass. 134; *Meyers v. Markham*, 90 Minn. 230; *James v. Burchell*, 82 N. Y. 108; *Broadhead v. Reinbold*, 200 Pa. St. 618. See also *Leonard v. Bates*, 1 Blackf. (Ind.) 172; *Russ Lumber Co. v. Muscupiabe Co.*, 120 Cal. 521.

³ *Garberino v. Roberts*, 109 Cal. 125; *Webb v. Stephenson*, 11 Wash. 342. See also *Joyce v. Shafer*, 97 Cal. 335; *Shively v. Semi-Tropic Co.*, 99 Cal. 259. These cases, like those in the preceding note, relate to real estate.

⁴ *Ripley v. McClure*, 4 Exch. 345.

ing or preparing to perform his promise.¹ Though the reason given does not warrant the conclusion reached that the innocent party must have an immediate right of action, there can be no doubt of the correctness of the reason itself.²

Another illustration of the fact that the liability of the party who is to perform first is not so absolute as to be wholly independent of anything which the other party to the contract may do, is shown by the fact that if the party from whom the prior performance is due does not in fact perform until after the time when performance by the other party is due, his liability immediately becomes conditional on the performance of the later promise. The commonest illustration of this, perhaps, is where goods are sold on credit, but delivery has not been made when the term of credit expires. In such a case the seller's lien revives, or, in other words, the obligation of the seller to deliver becomes conditional on the performance by the buyer of his promise to pay the price.³ This application of the principle is universally admitted, and by the weight of modern authority in this country, at least, the broader principle is laid down that wherever suit is not brought for the earlier performance until after the time for the later performance, the defendant's liability becomes conditional on performance or tender of performance by the plaintiff.⁴

Conditional sales, so called, present the only class of cases where it is at all usual for the buyer to agree to pay the price before he acquires title to the property. In such sales the practice is for the

¹ *Hochster v. De La Tour*, 2 E. & B. 678.

² *Wald's Pollock, Contracts*, 3 ed., 361.

³ *Sale of Goods Act*, § 41 (1) (b). The statutory provision is based on the decisions of *New v. Swain*, 1 Dans. & L. 193; *Bunney v. Poyntz*, 4 B. & Ad. 568. So in this country, *Leahy v. Lobdell*, 80 Fed. Rep. 665, 667 (C. C. A.); *McElwee v. Metropolitan Lumber Co.*, 69 Fed. Rep. 302 (C. C. A.); *Robinson v. Morgan*, 65 Vt. 37.

⁴ *Hill v. Grigsby*, 35 Cal. 656; *McCroskey v. Ladd*, 96 Cal. 455; *Irwin v. Lee*, 34 Ind. 319; *Soper v. Gabe*, 55 Kan. 646; *Brentnall v. Marshall*, 10 Kan. App. 488; *Beecher v. Conradt*, 13 N. Y. 108; *Eddy v. Davis*, 116 N. Y. 247; *Shelly v. Mikkelsen*, 5 N. D. 22; *Boyd v. McCullough*, 137 Pa. St. 7, 16; *First National Bank v. Spear*, 12 S. D. 108; *Hogan v. Kyle*, 7 Wash. 595. See also *McElwee v. Bridgeport Land Co.*, 54 Fed. Rep. 627 (C. C. A.). But see *contra*, *Weaver v. Childress*, 3 Stew. (Ala.) 361; *Hays v. Hall*, 4 Port. (Ala.) 374, 387; *White v. Beard*, 5 Port. (Ala.) 94, 100; *Duncan v. Charles*, 5 Ill. 561; *Sheeren v. Moses*, 84 Ill. 448; *Gray v. Meek*, 199 Ill. 136, 139; *Allen v. Sanders*, 7 B. Mon. (Ky.) 593; *Coleman v. Rowe*, 6 Miss. 460; *Clopton v. Bolton*, 23 Miss. 78; *McMath v. Johnson*, 41 Miss. 439; *Bowen v. Bailey*, 42 Miss. 405; *Biddle v. Coryell*, 3 Har. (N. J.) 377. See also *Loud v. Pomona Land Co.*, 153 U. S. 564, 580; *Bean v. Atwater*, 4 Conn. 3; *White v. Atkins*, 8 Cush. (Mass.) 367; *Kettle v. Harvey*, 21 Vt. 301.

buyer to be given possession of the thing purchased; the seller retaining title, however, until the price is paid. Sometimes none of the price is paid at the time the goods are delivered; more frequently an instalment of the price is payable then and the balance of the price is payable either in instalments or as a whole at a later time. Such a transaction is in its essence analogous to a transfer of title to the buyer, and a mortgage back by the buyer to the seller in order to secure the price. If the bargain related to real estate, it would probably take that form. When it relates to chattels, largely, perhaps, because the value of the subject matter of the bargain is not great enough to make desirable formalities usual with real estate, the parties, as a short cut to reach the same result, generally provide that the seller shall retain title. He retains it, however, merely as security. The beneficial interest in the property, so far as is not inconsistent with the security of the seller, is vested in the buyer.¹

In conditional sales the buyer, relying on his possession of the goods as sufficient to secure him for such portion of the price as he may pay before title passes to him, is content to pay part of the price in advance. He does not, however, in any common case pay any part of the price until delivery. For this reason

¹ In *Carpenter v. Scott*, 13 R. I. 477, 479, speaking of such a sale, the court said: "Under it the vendee acquires not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale or mortgage. Upon performance of the condition of the sale, the title of the property vests in the vendee, or, in the event that he has sold or mortgaged it, in his vendee or mortgagee without further bill of sale. *Day v. Bassett*, 102 Mass. 445, 447; *Crompton v. Pratt*, 105 Mass. 255, 258; *Currier v. Knapp*, 117 Mass. 324, 325, 326; *Chace v. Ingalls*, 122 Mass. 381, 383." In *Chicago Railway Equipment Company v. Merchants' Bank*, 136 U. S. 268, 283, while referring to notes each of which contained a statement that it was given for personal property the title to which should remain in the payee until the note was paid, Harlan, J., who delivered the opinion of the court, said: "The agreement that the title should remain in the payee until the notes were paid . . . is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid. . . . The suggestion that the maker could not have been compelled to pay if the cars had been destroyed before the maturity of the notes, is without any foundation upon which to rest. The agreement cannot properly be so construed. The cars having been sold and delivered to the maker, the payee had no interest remaining in them except by way of security for the payment of the notes given for the price."

The common statutes requiring a conditional sale, like a chattel mortgage, to be recorded, show a general recognition of the similarity of the two transactions.

the wording of the English Sale of Goods Act is unfortunate. The Act apparently fails to provide for the case which it is intended to cover. Sub-section (2) of the section under consideration¹ allows a recovery of the price where it "is payable on a day certain, irrespective of delivery . . . although the property in the goods has not passed." The insertion of the words "irrespective of delivery" gives the sub-section an inadequate effect, and these words seem somewhat inconsistent with the end of the sentence quoted. In conditional sales the seller who has delivered possession should certainly be allowed to recover the full price, because by the terms of the bargain the price is to be paid irrespective of the transfer of title; but the price is not to be paid irrespective of delivery, and under the English statute it is hard to see how the seller could recover more than the difference between the contract price and the market price for the goods. In this country there seems to be no reason to doubt that the seller, if he has delivered the goods to the buyer, may recover the full price.² In many jurisdictions the seller is allowed to recover the price, even though the subject matter of the sale has been accidentally destroyed.³ Such decisions necessarily involve the seller's right to recover the price irrespective of transfer of title. The contrary decisions contain, however, no implication that if the property had not been destroyed the seller could not recover the instalments of the price payable before the time for transferring title.

Of course it is entirely possible to make the price payable irrespective of delivery as well as of transfer of title,⁴ but such a contract must be unusual.

¹ § 49.

² *Smith v. Aldrich*, 180 Mass. 367; *Whitney v. Abbott*, 191 Mass. 59. As Massachusetts does not permit the seller, generally, to recover the full price until title has passed, the decision has peculiar force. See also *Tufts v. Poness*, 32 Ont. 51.

³ *Chicago Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 283; *Burnley v. Tufts*, 66 Miss. 48; *Tufts v. Wynne*, 45 Mo. App. 42; *American Soda Fountain Co. v. Vaughn*, 69 N. J. L. 582; *Tufts v. Griffin*, 107 N. C. 47; *Topp v. White*, 12 Heisk. (Tenn.) 165; *Lavalley v. Ravenna*, 62 Atl. Rep. 47 (Vt.); *Goldie v. Harper*, 31 Ont. 284. See also *Cooper v. Chicago Organ Co.*, 58 Ill. App. 248; *Osborn v. South Shore Co.*, 91 Wis. 526; *Hesselbacher v. Ballantyne*, 28 Ont. 182. There are, however, a number of contrary decisions. *Arthur v. Blackman*, 63 Fed. Rep. 536; *American Soda Fountain Co. v. Blue*, 40 So. Rep. 218 (Ala.); *Bishop v. Minderhout*, 128 Ala. 162; *Randle v. Stone*, 77 Ga. 501; *Glisson v. Heggie*, 105 Ga. 30, 32; *Mountain City Co. v. Butler*, 109 Ga. 469; *Swallow v. Emery*, 111 Mass. 355; *Sloan v. McCarty*, 134 Mass. 245; *Cobb v. Tufts*, 2 Willson Civ. Cas. (Tex.) § 154.

⁴ See *Gray v. Booth*, 64 N. Y. App. Div. 231.

For the reasons here given, in the proposed Sales Act of the Conference of Commissioners for Uniform State Laws the English statutory provision is thus changed:

"§ 63.—[ACTION FOR THE PRICE.] (1) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

"(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

"(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of § 64 (4)¹ are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's, and may maintain an action for the price."

Samuel Williston.

¹ "§ 64. (4) If, while labor or expense of material amount is necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."

EQUITABLE INTERESTS IN FOREIGN PROPERTY.

Dedicated to Professor Langdell.

THE law of the situs governs the title to land. No more generally accepted doctrine, or one more clearly based upon principle and reason, exists in the whole body of the law. And this is as true of equitable as of legal title. Indeed, the distinction between legal and equitable rights is merely a distinction of municipal law, though it is fundamental and widespread. Looked at from within, the equitable interest is sharply contrasted with the legal; but viewed from without, the legal owner and the beneficiary are both alike persons who have claims, large or small, upon the land. Whether they work out their right through the sheriff or the chancellor is, after all, a question of procedure. Though the Massachusetts judge is quite familiar with a division of equitable and legal rights in Massachusetts land, if his attention is called to land in New York he is concerned only with the question what is the nature of a certain person's interest in it as a matter of fact; not by what process or as a result of what legal or equitable principle of New York law has the interest been created.

The law, then, treating equitable interests in land in this respect like legal interests, holds that such interests are governed by the law of the situs. Thus the question whether a trust in land exists in favor of a certain claimant will in every court be determined as in the court of the situs. If by the law of the situs the transaction in question created a valid trust, the trust will be recognized in the courts of the situs;¹ and it will be recognized equally in the court of another country, though the law of the forum would not create a trust under the circumstances,² and even though by the law of the forum the creation of equitable interests is forbidden.³ On the other hand, if by the law of the situs the

¹ *Kerr v. White*, 52 Ga. 362.

² *In re Fitzgerald*, [1904] 1 Ch. 573 (C. A.); *Godfray v. Godfray*, 12 Jur. N. S. 397 (Privy Council); *Knox v. Jones*, 47 N. Y. 389. In *Seaman v. Cook*, 14 Ill. 501, the law of the situs was applied, but was found to be the same as that of the forum.

³ *Siebberas v. De Geronimo*, *Journal du Palais*, 1895, iv. 28 (Court of Cassation, Palermo, 1899), translated in 2 Beale, *Cas. on Conf. of Laws*, 204. In that case it

transaction did not create a valid trust, a trust will not be held to exist either in the courts of the situs¹ or even in another state where the law would have created a valid trust as a result of the transaction.²

The same doctrine applies, of course, to a determination of the rights in real estate (necessarily equitable in countries governed by the common law) created by a foreign contract of marriage or marriage settlement. Such rights must be created in accordance with the law of the situs.³ In the same way the question

appeared that a trust had been created in land in Malta in favor of an Italian. The Italian code had abolished all trusts. It was urged that this provision applied to all Italian citizens, and made such a trust void, at least so far as the Italian courts were concerned; and this contention prevailed in the lower courts. The Court of Cassation, however, held otherwise. "The Italian law has dissolved trusts, entails, and other settlements in perpetuity established according to previous law; but only those which existed within the kingdom, and not those which, established in another territory, are subject to another autonomous and independent sovereign. It is even more false to suppose, as the court appears to have done, and as the defendants in error continually do, that the trusts in this case should be considered subjectively null by reason of the provisions of our law, and as objectively valid because at Malta, where the property is situated, they are authorized. A right cannot be at once valid and null; and if an Italian court attributed to Italians the absolute title in property, and yet held the property subject to a trust in the country where it is situated, what could be the effect of such a decision? It could not be executed in the country of situs, and would consequently be a mere academic opinion, deprived of juridical and practical value."

¹ *Perin v. McMicken*, 15 La. Ann. 154; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. Rep. 413; *Parkhurst v. Roy*, 7 Ont. App. 614.

² *In re Piercy*, [1895] 1 Ch. 83; *Nelson v. Bridport*, 8 Beav. 547, 10 Jur. 1043; *Acker v. Priest*, 92 Ia. 610, 61 N. W. Rep. 235; *Levy v. Levy*, 33 N. Y. 97; *Purdum v. Pavey*, 26 Can. 412. In *Hawley v. James*, 7 Paige (N. Y.) 213, the trust was clearly invalid by the law of the forum, but the court, holding that the validity of the trust must be determined by the law of the situs, investigated that law, and found the trust invalid by that law also.

³ This is the doctrine universally held in this country. *Besse v. Pellochoux*, 73 Ill. 285, 24 Am. Rep. 242; *Heine v. Mechanics' & Traders' Ins. Co.*, 45 La. Ann. 770, 13 So. Rep. 1; *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88; *Richardson v. De Giverville*, 107 Mo. 422, 17 S. W. Rep. 974.

This is also the doctrine of the continental courts. Anonymous, 1 *Seuffert's Archiv* 57 (Court of Wiesbaden, 1841), translated in 2 *Beale, Cas. on Conf. of Laws*, 250; *Samuel v. Arrouard*, 21 *Clunet* 544 (Civil Tribunal of Versailles, 1893), translated *ibid.*, 251.

In England an indefensible case perhaps takes the opposite view; *De Nicols v. Curlier*, [1900] 2 Ch. 410. Spouses married in France under the community system emigrated to England, where the husband acquired land. After his death his wife was held entitled to a community interest in the land. The result was reached by treating the marriage as involving a contract that the land should be held in community, and then, neglecting the Statute of Frauds, enforcing this supposed contract. The passages cited from Story's *Conflict of Laws* were opposed to this conclusion. The better view

whether a certain transaction constitutes a charge upon the separate estate of a married woman must be determined by the law of the situs.¹

But though the creation of equitable interests in land is a matter for the law of the situs alone, it does not follow that the courts of equity of another country may not in a sense exercise power over the foreign land, and deal with it as if equitable rights in it existed. It is clear that in certain cases a court of equity will decree a conveyance of foreign land in specific performance of a contract to convey,² or require mutual deeds to rectify the boundaries of foreign land,³ or decree a reconveyance for fraud.⁴ Such action of a court of equity is usually taken on the ground that the contract or the fraud creates a constructive trust, which equity is enforcing; and where the law of the situs creates such a constructive trust there is no obstacle to prevent a court of equity in another state, having jurisdiction of the parties, from enforcing the trust. But the power to enforce a conveyance of foreign land is not confined to cases where a constructive trust exists by the law of the situs; the foreign court may decree a conveyance as a remedy for a tort or breach of contract of the defendant, although no right to a conveyance is recognized in the courts of the situs.

The leading case of this sort is *Lord Cranstown v. Johnston*.⁵

is that taken by the American courts, that such a "contract" does not apply to land situated abroad. *Fuss v. Fuss*, 24 Wis. 256, 1 Am. Rep. 180, and cases cited.

¹ *Read v. Brewer*, 16 So. Rep. 350 (Miss., 1895); *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. Rep. 587. Therefore, where a married woman made an agreement in Louisiana, invalid by the law of Louisiana, the invalid agreement would nevertheless charge her separate estate in Mississippi land if such was the law of Mississippi. *Frierson v. Williams*, 57 Miss. 451.

² *Toller v. Carteret*, 2 Vern. 494.

³ *Penn v. Lord Baltimore*, 1 Ves. 444.

⁴ *Arglasse v. Muschamp*, 1 Vern. 75; *Massie v. Watts*, 6 Cranch (U. S.) 148.

⁵ 3 Ves. 170. In *Purdum v. Pavey*, 26 Can. 412, the Canadian court refused to apply the Canadian law of fraudulent conveyances and decree to a creditor of a Canadian insolvent a conveyance of land in Oregon conveyed in Canada by the insolvent to the defendant. Strong, C. J., said: "Whether the allegation of a 'trust' of the purchase-money secured by the mortgage, which the plaintiffs allege, is to be considered as an averment of a trust arising by operation of law consequent upon the illegality of the transaction or as an allegation of a conventional express trust, in either case the question would depend on the *lex rei sitae*, and from this alone it follows that the forum of the situs is the proper forum." If a so-called conveyance in fraud of creditors were a tort, this would seem to be opposed to the doctrine of *Lord Cranstown v. Johnston*. But in fact the act simply affects the title to land, and does not create a personal obligation, for breach of which suit can be brought. It has been suggested in one or two later cases that the doctrine of *Lord Cranstown v. Johnston* must be confined to land

The defendant, being a creditor of the plaintiff, lulled him into security, and refused offers of payment and requests for an account, and meanwhile brought suit against him in the island of St. Christopher, obtained judgment, had land there sold to satisfy the judgment, and bought it himself at an inadequate price. It was admitted that the plaintiff had no claim upon the land, either legal or equitable, in St. Christopher's; yet on his bill in England for a reconveyance the court granted a decree, — the Master of the Rolls, Sir Richard Pepper Arden (Lord Alvanley) saying, "I must forget the name of the court in which I sit if I refuse to grant it." Though the judgment and the sale were regular, a cause of action existed because of the fraud on the plaintiff perpetrated in England.

In *Ex parte Pollard*¹ the petitioner was a creditor with whom a bankrupt, previous to the bankruptcy, had deposited by way of security the documents of title to land in Scotland. This transaction involved an agreement to make a mortgage, and in England would be treated as a mortgage in equity. In Scotland the contract would be legal, but the transaction would not create any lien or equitable mortgage on the land. Lord Cottenham allowed the petitioner to subject the Scotch land to his debt, saying:

"It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the courts of equity to operate *in rem*; but in contracts respecting lands in countries not within the jurisdiction of these courts they can only be enforced by proceedings *in personam*, which courts of equity here are constantly in the habit of doing: not thereby in any respect interfering with the *lex loci rei sitae*. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities."²

which is in some part of the British dominions; but there is no warrant for this view in the case itself or in principle, and it has never been seriously urged.

¹ Mont. & C. 239.

² See to the same effect *Scott v. Nesbitt*, 14 Ves. 438, where Lord Eldon "upon principles of natural justice" charged upon a West Indian estate the balance of an account in favor of a managing co-owner, though the law of the situs allowed no charge.

In such cases as these, it seems clear that the court is enforcing a remedy for a breach of obligation, not executing a constructive trust in the land. It is true, as has been said, that equity usually acts in such cases by way of executing an existing property right; but Lord Cottenham seems entirely correct in saying that a court of equity has power to decree a conveyance as remedy for a mere breach of personal obligation. That such a power was exercised by the earlier chancellors no one will deny; that the interest in land called a constructive trust is a result, not a cause, of this exercise of jurisdiction, is clear; and there is no reason for assuming that this ancient power has departed out of chancery, or that the chancellor cannot still exercise his prerogative, though the redress asked is for a purely personal wrong.¹

If, however, a contract creates an equitable interest in the land, in the nature of a constructive trust, by the law of the situs, this interest in the land will be everywhere recognized. Thus, where the title deeds of land in New York were deposited by the owner as security, and this transaction by the law of New York created an equitable mortgage, the existence of the equitable interest was recognized in a suit in New Jersey, although such a deposit of deeds did not by the law of New Jersey create an equitable interest in the land.² Upon a similar principle, where a contract concerning land in Massachusetts was made in North Carolina, the Massachusetts court recognized and enforced the interest in land thereby created by Massachusetts law, though the contract, being one between husband and wife, was one which could not have been

¹ It has been suggested that in such a case it is proper to speak of the foreign court as enforcing an equitable right to the land created by its law; an imperfect right, to be sure, and one not recognized at the situs of the land. To this theory there seem to be insuperable objections. First, it is opposed to the fundamental doctrine that interests in land can be created only by the law of the situs, since that law only can make interests in the land effective. Second, such a right would fail of recognition not merely at the situs, but in every other country as well. Another state, to be sure, might also grant equitable relief; but that would be in accordance with its own doctrines, not at all because of the decree or the possibility of the decree of the court under consideration. A right the existence of which will not be recognized either in the state controlling the *res* or in any third state can hardly be called a right of property. Third, the cases about to be considered carefully distinguish between the right, created by the law of the situs alone, and the remedy which may be given by the foreign court. The accurate way of describing the case seems to be that the foreign court treats the defendant *as if* the plaintiff had an equitable right in his land.

² *Griffin v. Griffin*, 18 N. J. Eq. 104.

made in Massachusetts, nor could suit be brought in that state on the contract.¹

So far as our investigation has proceeded we may summarize the results as follows. An equitable interest in land can be created only by the law of the situs: if that law creates an interest, the courts of all other states must recognize and enforce it; while, if the law of the situs does not create the equitable interest, no foreign court can assume the existence of such an interest. But since equity acts *in personam* it has power to act whenever it has jurisdiction over the person of a defendant; and if a defendant is shown to be in default for a breach of obligation, it may, in some cases at least, decree a conveyance of land by way of reparation for the injury, although there was no prior interest in the land created by the law of the situs. The limitations of this power must now be examined.

First, there must be a real obligation growing out of the transactions of the parties. If there is no equitable interest in the land, and there is no independent legal obligation in the owner to deal with the land for the benefit of a *cestui que trust*, the court of equity of another state cannot create and enforce such an obligation merely because it has power over the owner and regards the transaction as one which should have given rise to a trust. If I have been given land in state A under such circumstances that I have a complete title to it, and a right to do as I please with it, and I choose, for instance, to sell it and carry the proceeds into state B, the latter state cannot charge me with a trust for another merely because by the law of B the transaction by which I got title to the land would have resulted in my taking it in trust. If, to be sure, I had got the land by fraud, or had made and broken a contract to use the land for the benefit of another, I could be sued in state B for my breach of obligation, and state B, having jurisdiction over me, might compel me to give up the proceeds; but it could not call me to account merely for my failure to carry out a non-existent trust. The change in the corpus of the property from land to money and bringing the money into state B would not work a change in my rights. If I could not be made a trustee of the land, neither could I of the money.

Thus in a late English case Scotch immovables had been settled upon trust without power of alienation. The trustees had sold the

¹ Polson v. Stewart, 167 Mass. 211, 45 N. E. Rep. 737.

Scotch property and had invested the proceeds in English securities. The trusts in the proceeds were held still to depend upon Scotch law.¹ The Lord Justice Cozens-Hardy said, "I am aware that there has been a change of investment of part of this sum into English securities, but this change cannot alter the law applicable to the settlement."²

In one case, however, the court took a different view. An English testator devised land in Italy to trustees to sell and invest in English securities or land. By the law of Italy the devisee took freed from any trust. He sold part of the land; it was held that he took the proceeds upon the original trusts.³ The sale of the land, Mr. Justice North said, was not forbidden by Italian law.

"It is, indeed, said by one of the Italian advocates that the land is the 'patrimony,' and that, when the land is sold, the proceeds of sale — the money — are still the 'patrimony.' What is the law as to that? It depends altogether upon the person to whom the money belongs. No doubt, if the money belongs to an owner who is subject to Italian law, whatever the Italian law forbids as to trusts must be observed, and if any person owning this property is subject to Italian law, and attempts to create a trust which the Italian law forbids, then, according to Italian law, the trust would be void. But when there is an English owner of money arising from the sale of land which belongs to other persons, and is subject in their hands to Italian law, there is nothing in Italian law to make that money itself subject to Italian law; and therefore, in my opinion, the proceeds of sale, when received by the trustees in pursuance of the valid exercise of the power of sale which they have according to the Italian law, pass entirely by the testator's will, because the disposition is good according to English law, and is in no way at variance with Italian law, — meaning now by 'Italian law' not merely anything which is expressed in the Italian Code, but anything contrary to 'good custom' (whatever that may mean), — for the Italian law does not profess to regulate the disposition of English securities passing under the will of an Englishman to English legatees. In my opinion, therefore, the trust for sale being valid, the application of the proceeds of sale directed by the will is valid also."

As to that portion of the Italian land which was unsold, it was admitted that the Italian law governed all interests in it.

¹ *In re Fitzgerald*, [1904] 1 Ch. 573 (C. A.).

² See to the same effect *Waterhouse v. Stansfield*, 9 Hare 234, 10 Hare 254; *In re Hawthorne*, 23 Ch. D. 743; *Butler v. Green*, 65 Hun 99, 19 N. Y. Supp. 890. In *Nelson v. Bridport*, 8 Beav. 547, 10 Jur. 1043, the question was left undecided.

³ *In re Piercy*, [1895] 1 Ch. 83.

"The trust has not yet been entirely executed, and at the present moment a part of the testator's Italian land remains unsold, and is, therefore, subject to the law of Italy. The enjoyment of that land in the meantime, until it has been sold, is not in any way affected by the trust for sale, which has not yet been executed. We must look, therefore, to the Italian law to say what is the right to enjoy the land in the meantime, before the sale has actually taken place."

So far as this case presents the general question of the right of an English court to attach an equity to the proceeds of foreign land, it is submitted that the decision is erroneous, and is opposed to the decisions previously cited. It may be possible to support it on another ground. The trustee took not merely this land under the will, but also a large English estate, which he held in trust under the English law. It might be defensible to say that his acceptance of the whole trust involved a contract to perform so far as he was able the provisions of the will, and that the English court was really granting specific performance of this obligation, upon the principle already explained. This would involve a mere question of English law.

The court in this case in fact proceeded largely on the ground that the will effected an equitable conversion of the land into personalty. But it seems clear that the question whether land has been equitably converted into personalty must be determined by the law of the situs of the land;¹ and the Italian law did not permit the equitable conversion. In a somewhat similar American case the testator, domiciled in Pennsylvania, directed the sale of land in New Jersey, the proceeds to be held on certain trusts invalid by the law of Pennsylvania. The New Jersey court held the trust invalid, because the Pennsylvania law applied; the land in New Jersey being to be sold, and therefore not involved in the trust.² The distinction, however, between the cases is that in the American case the New Jersey law permitted the trust, and so far as the land was concerned allowed the sale and would have attached the trust to the proceeds; but by the law of New Jersey the land was regarded as equitably converted into personalty, and the law of the domicile was therefore

¹ *Clarke v. Clarke*, 178 U. S. 186. Conversely, the question whether personalty has been so far converted into land by a will that the validity of the trust on which the land is to be held is governed by the law of the situs of the land to be purchased, will be determined by the law that governs the personalty, that is, the law of the domicile. *Macpherson v. Stewart*, 28 L. J. Ch. 177, 32 L. T. R. 143.

² *Jenkins v. Guarantee T. & S. D. Co.*, 53 N. J. Eq. 194, 32 Atl. Rep. 208. See to the same effect *Bible Society v. Pendleton*, 7 W. Va. 79.

the law which New Jersey applied to the legacy. On the same ground of equitable conversion the validity of a trust in a will which devises land in one state to be sold and the proceeds invested in lands in another state on the trust in question has been held to depend upon the law of the second state.¹

The second limitation on the power of a foreign court to decree a conveyance by a defendant within its jurisdiction is this: that the obligation violated must have run from the defendant to the plaintiff. If land in a common law state subject to an equitable claim is sold to a purchaser with notice, he is bound to respect the equity. But this is because he takes the land subject to the other's equitable right; and if by the law of the situs there is no equitable right in the land, the purchaser cannot be subjected to a claim on the part of the asserted beneficiary, even though he would be held a trustee if the land were in the state of forum. The doctrine of Lord Cranstown *v.* Johnston and of *Ex parte* Pollard cannot be invoked unless there is privity of obligation between the parties.

The question was first debated in the case of *Martin v. Martin*.² In that case a wife owned before marriage an estate in Demarara, which by the marriage settlement was settled on her and her children. This settlement, however, did not affect the title, either legal or equitable, according to the law of Demarara. The husband and wife after marriage mortgaged the land to the defendants with notice of the settlement, and the mortgage was duly enrolled in Demarara. This was a bill to declare the mortgage void. Leach, Master of the Rolls, held that the English court could not hold the defendant bound by any equity arising out of the settlement.

"The settlement as executed does by the law of Demarara in no manner affect the right and power of the husband and wife over the estate, and leaves them with the same absolute ownership that they would have had if there had been no settlement. The equity of the wife appears to me, therefore, not to be attached to the estate, but to the person of the husband, by reason of his contracts, and to give the wife a right only to claim an equivalent."

This principle was further applied in the case of *Norris v. Chambres*.³ The plaintiff had purchased and partly paid for land

¹ *Ford v. Ford*, 80 Mich. 42, 44 N. W. Rep. 1057; *Ford v. Ford*, 70 Wis. 19, 33 N. W. Rep. 188.

² 2 Russ. & M. 507.

³ 29 Beav. 246, 30 L. J. Ch. 285, 7 Jur. N. S. 59, 9 W. R. 259; on appeal, 2 De G. F. & J. 583.

in Prussia; but before he secured a conveyance the owner conveyed to the defendant with notice. The court held that unless the law of Prussia created an equity in the land an English court could not charge the land in the defendant's hands with the amount paid by the plaintiff, even by a decree operating purely *in personam*. Romilly, Master of the Rolls, said:

"Independently of the lien which this court is asked to declare, if needed, and which it is not asked to create, there is no equity between the parties; here the plaintiff is entitled to no decree against the defendants for payment of any sum of money, nor is any such claimed, but the equity and relief sought begin and end with a prayer to make a certain transaction between other persons, one of whom is a stranger to the plaintiff, an interest in an estate in Prussia, belonging to that stranger, and this independently of all personal equities attaching upon him. I never heard of any such case, and I will not be the first judge to create such a precedent, which, if adopted, for aught I see, would go to assert a right in the courts here to determine questions between foreigners, relating exclusively to immovable property in their own country."

In affirming this opinion Lord Campbell also pointed out that there was no contract between the parties. These decisions have been universally followed.¹

If, however, the purchaser with notice contracts to pay the money due on account of the land from the seller to a third party, the foreign court having jurisdiction of the purchaser may compel him to make the payment out of the land. By reason of his contract he is in personal default, and the court may give a redress which includes a decree that he shall deal in a certain way with the land. In *Mercantile Investment & G. T. Co. v. River Plate T. L. & A. Co.*² it appeared that an American corporation, holding a grant of land from the Mexican government, issued debentures purporting to bind the land; but the hypothecation was not duly registered in Mexico, and therefore did not bind the land. The corporation then transferred the land to the defendant, an English company, which as part of the consideration agreed to pay the debentures. The

¹ *Hicks v. Powell*, L. R. 4 Ch. 741, 17 W. R. 449; *Norton v. Florence L. & P. W. Co.*, 7 Ch. D. 332, 38 L. T. R. 377, 26 W. R. 123; *In re Hawthorne*, 23 Ch. D. 743. In *Norton v. Florence L. & P. W. Co.*, Jessel, M. R., said: "You cannot by reason of notice to a third person of a contract which does not bind the property thereby bind the property, if the law of the country in which the immovable property is situate does not so bind it."

² [1892] 2 Ch. 303.

plaintiffs, holders of the debentures, filed their bill to have the proceeds of the land applied to the payment. Mr. Justice North, after citing the case of *Lord Cranstown v. Johnston*, said :

"It would be most unconscionable to allow the defendants here, who have registered their assignment in Mexico subject to the obligations created in favor of the plaintiffs, who have obtained the land at a consideration measured to some extent by the existence of those obligations and the taking by the English company upon themselves of the burden of satisfying those obligations ; in my opinion it would be as unconscionable as anything could be to say that now, because they had registered their transfer before the hypothecation of the plaintiffs had been registered, they are at liberty to set the plaintiffs at defiance altogether. It was said that the case I have cited went upon fraud. Such a fraud as there was in that case I think would equally exist in the present case if the English company were attempting to do what their counsel claims for them a right to do. . . . In my opinion they clearly would be liable if they misapplied the proceeds of this land without making due provision for the plaintiffs' claims ; and, in my opinion, they could be restrained by this court from so applying any part of the proceeds of the land which ought to go to satisfy those claims, and, what is more, I think that the company and every officer who took part in such proceedings would be personally responsible to the court in respect of any such misapplication of the funds which might be made."

The third limitation on the power of the court to make any decree for a reconveyance of foreign land is based on the lack of jurisdiction of a court of equity to order the doing of an act on foreign soil. The decree of the court cannot directly affect the foreign land ; if it is to be effective, it must be through a conveyance of the land by the defendant. In countries governed by the common law land may be conveyed by a deed made anywhere ; and a court of equity may therefore make an effective decree by ordering the defendant to give a deed of foreign land. But in countries governed by the civil law a conveyance of land or of any interest in land is usually ineffective unless it is registered in the country of the situs. A court of equity cannot decree such registry ; and therefore it cannot through its jurisdiction over the owner of land in such a country exercise any control over the title to the land. As Lord Campbell said in the case of *Norris v. Chambres* :¹

"An English court ought not to pronounce a decree, even *in personam*, which can have no specific operation without the intervention of a

¹ 2 De G. F. & J. 583.

foreign court, and which in the country where the lands to be charged by it lie would probably be treated as *brutum fulmen*."

The principles regulating trusts of movables are more complex but more restricted. No case has been found, and probably none exists or is likely to be decided, where a court has attempted to find grounds for ordering a conveyance of foreign movables, not the proceeds of foreign land, on the ground merely of fraud or breach of contract. We have to consider only cases of express trust.

On the other hand, land must always remain in the place where it was at the time of creation of the trust; movables, however, may be removed into another place, and thus become subjected to another law. Questions as to trusts in movables therefore fall into two classes: questions concerning the creation of the trust, and questions concerning its administration.

A trust may be created either by will or by settlement *inter vivos*. As to a trust of movables created by will, there is no doubt that its validity must be tested in the first instance by the law of the testator's domicile. If valid by that law, it will be recognized and enforced everywhere,¹ though the trustee is domiciled at the time in another state which would hold the trust invalid,² or subsequently removes there,³ though the beneficiaries live in such a state,⁴ or the property is there at the time the trust is created.⁵

While this doctrine is universally admitted, it is to be noticed that the legality of the trust may, by the law of the domicile, depend

¹ *Godfray v. Godfray*, 12 Jur. N. S. 397; *Riddle v. Hudgins*, 58 Fed. Rep. 490; *English v. McIntyre*, 29 N. Y. App. Div. 439. Though the law of the domicile of the testator is applied, it is because such is the provision of the law of the actual situs; and the law is that which exists at the moment of devolution of the property. So where an Italian died, leaving English movables on certain trusts, and the law of Italy at the time of his death allowed the trusts, but was afterwards changed with a retroactive clause, the trusts were sustained. *In re Aganoor's Trusts*, 13 Rep. 677, 64 L. J. Ch. 521 (1895).

² *Handley v. Palmer*, 91 Fed. Rep. 948; *Hussey v. Sargent*, 116 Ky. 53, 75 S. W. Rep. 211; *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 41 Atl. Rep. 252; *Cross v. United States Trust Co.*, 131 N. Y. 330, 30 N. E. Rep. 125; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. Rep. 407; *De Renne's Estate*, 12 Wkly. N. Cas. (Pa.) 94.

³ *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. Rep. 636.

⁴ *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 41 Atl. Rep. 252; *Merritt v. Corties*, 24 N. Y. Supp. 561; *Parkhurst v. Roy*, 7 Ont. App. 614.

⁵ *Despard v. Churchill*, 53 N. Y. 192.

upon the place where the trust is to be administered. Thus a statute forbidding certain charitable bequests may be held to apply only to bequests to be administered within the state, on the ground that the giving of itself is not the objectionable thing, but the administration of the gift; and it may accordingly be held that such a gift to a foreign charity is valid by the law of the domicile, in spite of the statutory provision against such gifts.¹

The validity of trusts created in a settlement *inter vivos* is not so clear a question. Older writers on the conflict of laws, alleging a maxim *mobilia sequuntur personam*, laid it down that the law of movables was the law of the domicile of the owner. But this fictitious doctrine has been practically abandoned in modern times so far as tangible movables are concerned, and the rule which is in consonance with reason has been accepted: that the validity of a transfer of chattels depends on their situs at the time of transfer.² In accordance with this doctrine it seems to be held that the validity of a trust in tangible movables depends upon the law of their situs at the time the trust settlement was made.³

This principle seems to have been involved in the case of *Van Grutten v. Digby*.⁴ In that case a woman, entitled to property under an English trust, married in France. A marriage agreement was made in France, which was invalid by French law, but would by English law be a valid limitation of the terms of the original trust. The court held that the effect of this agreement upon the English trust must be determined by the English law. Romilly, Master of the Rolls, said that if a contract relates to the regulation of property within the jurisdiction and subject to the laws of England, the court will administer the law as if the whole transaction were to be regulated by English law.⁵

In the case of *Fowler's Appeal*⁶ this question was involved, but was not finally settled. The settlement was made in Illinois, by a person domiciled there. The property, so far as appears, consisted

¹ *Sickles v. New Orleans*, 80 Fed. Rep. 868; *Van Sant v. Roberts*, 3 Md. 119; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Despard v. Churchill*, 53 N. Y. 192; *Hope v. Brewer*, 136 N. Y. 126, 32 N. E. Rep. 558.

² *Cammell v. Sewell*, 5 H. & N. 728; *Green v. Van Buskirk*, 5 Wall. (U. S.) 307, 7 Wall. (U. S.) 139.

³ So far as choses in action were included in the settlement, the validity should be determined primarily by the place of making the settlement.

⁴ 31 Beav. 561, 32 L. J. Ch. 179, 7 L. T. R. 455, 9 Jur. N. S. 111, 11 W. R. 230.

⁵ This case was followed in *Viditz v. O'Hagan*, [1899] 2 Ch. 569.

⁶ 125 Pa. St. 388, 17 Atl. Rep. 431.

in stock of corporations outside Pennsylvania. The trustee was a Pennsylvanian. The court, without deciding what law would govern the validity, held that it was not that of Pennsylvania.

So far we have considered merely the validity of the conveyance in trust; but it is still necessary to determine what law governs the administration of the trust. Since it becomes the duty of the trustees, if the trust is valid, to take the chattels to a certain place and administer them there, and there is nothing in the law of any state to prevent them from taking the chattels to that place, the chattels, if the provisions of the trust are carried out, will be submitted, as to all questions arising in the course of administration, to the law of the place where the trust is to be administered. This place is sometimes easy but often difficult to determine. In case of a trust created by will, the place of administration will ordinarily be the place of settling the estate, that is, the domicile of the testator, irrespective of the domicile of the trustee or of the beneficiaries.¹

There is, however, a class of trusts created by will where the administration of the trust is clearly to be elsewhere than the domicile of the testator. A typical case of this class is a bequest to a charity permanently located in another state. In such a case, if the mere gift in trust is in itself valid, the validity of the administration of it is to be governed by the law of the place where the charity is to be located; and that law determines all questions concerning the administration, such as alienability, accumulation, etc.² So where an Ontario testator bequeathed movables to the State of Vermont, on certain trusts, with provisions for accumulation, the law of Ontario determined whether such a direction invalidated the bequest; and the bequest being valid, it was for Vermont to determine whether the accumulation should be carried out, or the period of enjoyment accelerated.³

A question of interpretation is presented by the mortmain acts of several states. Do such acts forbid the administration of testamentary gifts by charities, or do they simply limit the right to pass the property on the proposed trusts? It is now agreed that they do not limit the power to administer; and that if a gift is made to a charity by a testator domiciled in a state where there is no

¹ *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 41 Atl. Rep. 252.

² *Ibid.*

³ *Parkhurst v. Roy*, 7 Ont. App. 614.

mortmain act, the gift may be taken and administered in a state where the gift would have been illegal.¹

In the case of a settlement *inter vivos* the place of administration of the trust is a more difficult question. In many cases the situs of the trust will be taken to be the place of creation, that being the settler's domicile; and all questions involving the administration of the trust will be determined by that law, though the trustee may be domiciled elsewhere or may subsequently remove to another state.²

The most important questions of this sort have arisen in England upon marriage settlements. If both parties to the marriage are domiciled in one country, the situs of the trust would naturally be in that country. So where upon a marriage of a Scotch man and woman a marriage settlement was made by virtue of which the husband had a right upon a certain contingency to have the property transferred to him absolutely, this transfer was ordered by an English court, though opposed to the English practice, which would have required a provision for the wife and children in such a case.³

On this principle the interesting case *In re Fitzgerald*⁴ may be supported. A marriage being had between an Englishman and a Scotchwoman, a settlement was entered into, by which several English trustees were constituted to hold and manage English chattels settled by the husband and Scotch chattels settled by the wife. The parties intended to live in England. The question was whether an alienation by the husband of all his interest under the

¹ *Canterbury v. Wyburn*, [1895] A. C. 89 (Privy Council) (see however *Attorney-General v. Miller*, 3 Russ. 328, 3 Dow & Cl. 393); *Healy v. Reed*, 153 Mass. 197, 26 N. E. Rep. 404; *Fellows v. Miner*, 119 Mass. 541; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. Rep. 407. In the last case the chattels bequeathed were in the state where the charity was established; nevertheless, in spite of the mortmain act of that state, the bequest was held good. Conversely, the rule against perpetuities has to do with the administration of the trust. It was held that a direction in a will of a testator who was apparently English to invest money in Scotch land would be carried out, though the trusts on which the land was to be held were forbidden by the English law as violating the rule against perpetuities. *Fordyce v. Bridges*, 2 Phil. 497, 17 L. J. Ch. 185.

² *First Nat'l Bank v. Nat'l Broadway Bank*, 156 N. Y. 459, 51 N. E. Rep. 398. So in *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 22 N. E. Rep. 572, a married woman having constituted herself a trustee in New York, her subsequent removal to New Jersey, where a married woman could not take personal property, did not put an end to the trust.

³ *Anstruther v. Adair*, 2 Myl. & K. 563.

⁴ [1903] 1 Ch. 933. The case was reversed on appeal because the corpus of the trust was found to be Scotch immovable property. [1904] 1 Ch. 573.

settlement was valid, as it would be by English law, or invalid according to the Scotch law. The court decided that the parties intended an English trust, and that the alienability should be determined by the English law. But in *Heywood v. Heywood*,¹ where an Irishwoman married an Englishman, and each settled money in English trustees, Romilly, Master of the Rolls, seems to have inclined to the opinion that as to the sum contributed by the wife this was an Irish trust.

Joseph H. Beale, Jr.

¹ 29 Beav. 9, 30 L. J. Ch. 155.

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STOCKHOLDERS' RIGHT OF PRÉEMPTION. — For just a century authorities have steadily accumulated recognizing a right in stockholders of a corporation, under certain circumstances at least, to subscribe for and demand the same proportion of a new issue of capital stock that they respectively hold of stock previously issued.¹ Through this right of préemption is sought the preservation to each stockholder of his relative vote and voice in the management of the corporation;² also the preservation of his proportionate interest in the corporation's capital or surplus or other property,³ for a diminution of this proportion causes him pecuniary loss unless full value paid for new stock offsets the decrease in proportionate interest by a corresponding increase in the corporation's property. A further subsidiary reason for the right is, perhaps, found in its furnishing a cumulative remedy in the nature of self-help to minority stockholders against issues of stock fraudulently made to particular persons.⁴ On the other hand, the corporation may need funds or other property to fulfill the objects of its incorporation; and public policy, as well as the interests of the stockholders as a body, demands that the corporation be allowed every facility to satisfy its needs. The equitable point of equilibrium between these conflicting interests of the corporation or the stockholders *en masse* and of individual stockholders seems found in allowing this right of préemption so far and only so far as it does not seriously hamper the corporation.⁵

In accordance with these principles stockholders are given first chance

¹ See *Gray v. Portland Bank*, 3 Mass. 364 (1807); also, cases cited in *Cook, Corp.*, 5 ed., § 286, and in 26 Am. & Eng. Encyc., 2 ed., 947. But *cf.* *Ohio, etc., Co. v. Nunnemacher*, 15 Ind. 294.

² See *Dousman v. Wisconsin, etc., Co.*, 40 Wis. 418, 421; *Crosby v. Stratton*, 68 Pac. Rep. 130, 132 (Col.). *Cf.* *Humboldt, etc., Ass'n v. Stevens*, 34 Neb. 528, 535.

³ See *Jones v. Morrison*, 31 Minn. 140, 153; *Crosby v. Stratton*, *supra*.

⁴ See *Meredith v. New Jersey, etc., Co.*, 55 N. J. Eq. 211, 220; *aff.* 56 N. J. Eq.

454.
⁵ See *Stokes v. Continental, etc., Co.*, 91 N. Y. Supp. 239, 246.

to obtain new stock,⁶ and probably original stock remaining untaken,⁷ when issued at a cash price. If, however, stock once issued returns to the possession of the corporation and is reissued, there is no right of preemption,⁸ for the old stockholders are not thereby deprived of the proportionate interests in the corporation which they have hitherto enjoyed. Likewise, when stock has been issued in payment for property, the right of preemption has been denied.⁹ In each of the adjudicated cases, however, the property was of a peculiar nature and readily to be furnished only by this particular vendor. Indeed, unless the property bought have these characteristics, it seems that the usual privilege of preemption should be allowed; for, if stockholders can provide the needed property as well as an outsider, the corporation cannot be seriously harmed by allowing them to preserve their proportionate stockholdings by furnishing other commodities as well as the particular commodity, money.

Granted that a right of preemption exists, the further question arises whether the corporation can fix the terms upon which the stockholders may obtain their proportionate shares of new issues of stock. According to text-writers, stockholders must be offered the stock at par;¹⁰ and while in most of the cases this particular question has not been material because the corporation has not attempted to sell the stock except at par,¹¹ there are one or two decisions expressly to the same effect.¹² For the denial of a right to subscribe at par, the measure of damages is, of course, the difference between the par and the market value.¹³ In a recent case in New York, however, where the corporation sold all the new stock to outsiders at a fixed price, a dissenting stockholder was allowed to recover the difference between the fixed price of sale and the market value. *Stokes v. Continental, etc., Co.*, 36 N. Y. L. J. 589 (N. Y., Ct. App., Nov. 13, 1906). The case expressly represents the doctrine that the stockholders have a first chance to purchase the stock, not at par, but on any reasonable terms that the corporation may prescribe for its sale. The corporation would even be allowed to provide for a sale at public auction; for practically the stockholder might preserve his proportionate stockholdings by paying the same price for additional stock that others would pay, although strictly he must pay one unit more. But a sale to the highest bidder upon sealed proposals would probably be held improper. This doctrine seems firmly grounded in business sense and justice. The stockholders are given a fair opportunity to preserve their proportionate influence and interests in the corporation and its property by purchasing new stock; furthermore, if any be prevented from so doing by a sale at a price at or above actual value, as already noted, they suffer no pecuniary harm. On the other hand, this rule, unlike that of the text-writers, does not impede the corporation in most easily and effectively satisfying its needs and devel-

⁶ See cases cited in 26 Am. & Eng. Encyc., *supra*.

⁷ See *Crosby v. Stratton*, *supra*; *Morris v. Stevens*, 17 Pa. Co. Ct. Rep. 209, 213. But cf. *Sims v. Street R. R. Co.*, 37 Oh. St. 556; *Curry v. Scott*, 54 Pa. St. 270.

⁸ *Hartridge v. Rockwell*, R. M. Charl. (Ga.) 260; *State v. Smith*, 48 Vt. 266; *Crosby v. Stratton*, *supra*.

⁹ *Meredith v. New Jersey, etc., Co.*, *supra*. See also *Russell v. Rock, etc., Co.*, 184 Pa. St. 102; *Bonnet v. First, etc., Bank*, 24 Tex. Civ. App. 613.

¹⁰ See *Cook, Corp.*, 5 ed., § 286; *Beach, Priv. Corp.*, § 473.

¹¹ See, e. g., *Eidman v. Bowman*, 58 Ill. 444; *Jones v. Morrison*, *supra*.

¹² *Cunningham's Appeal*, 108 Pa. St. 546; *Hammond v. Edison, etc., Co.*, 131 Mich. 79.

¹³ *Gray v. Portland Bank*, *supra*.

oping its resources; and if the legal limit of stock issues has nearly been reached, it does not virtually compel a dividend of the difference between the par and the market value of the new stock.¹⁴

LEGITIMATION SUBSEQUENT TO BIRTH.—Legitimacy conforms to the usual rule that the state of domicile determines status. This rests upon the peculiar and permanent interest of sovereign in subject.¹ Strictly this status is not triangular, but exists between the child and each parent separately. Legitimacy as to one parent only is a doctrine familiar to the civil law, but not to be found in any common law holding. Nor is legitimacy necessarily dependent upon marriage, though universally associated with it. The proper sovereign may legitimate quite regardless of wedlock.² Once impressed upon the natural relation of parent and child, the status persists, surviving change of domicile. Other states admit its existence, though because of local law they may refuse full recognition to its legal consequences. Thus by the feudal law of England realty can descend only upon legitimate persons actually born in wedlock.³

A New York court recently lost sight of these principles when it withheld a devise from *antenati*, legitimated in Michigan by subsequent marriage of their parents, because a previous New York decree had refused to recognize the Michigan divorce first obtained by the father from a New York woman. *Olmsted v. Olmsted*, 51 N. Y. Misc. 309. In view of a peculiar New York doctrine, it is hard to understand why the court did not recognize that the Michigan man was divorced, though not the New York woman.⁴ This was refused, however, in reliance on *Haddock v. Haddock*.⁵ But granting that Michigan had under the doctrine of that case no jurisdiction to pronounce the father divorced, it does not follow that Michigan was without jurisdiction to pronounce the children legitimate. Having, by reason of the domicile of all parties concerned, complete jurisdiction *in rem*, she could and did impress the status of legitimacy upon these children *ab præsenti*; whether for reasons wise, mistaken, or arbitrary would seem no concern of New York's. Nor can any local policy⁶ or rule of real property⁷ be invoked to justify the decision. As the first fruits of *Haddock v. Haddock*⁶ it is not reassuring.

The law of legitimacy is not, however, without difficulties. Though courts agree that the state of the father's domicile at the child's birth is the proper one then to confer or withhold legitimacy¹ (at least as to the father), they do not always distinguish two kinds of subsequent legitimation. By the civil law subsequent marriage of the parents effects a valid pre-

¹⁴ See 18 HARV. L. REV. 541.

¹ *In re Goodman's Trusts*, 17 Ch. D. 266, *per James, J.*, at 297.

² *McDeed v. McDeed*, 67 IH. 545.

³ *Birtwhistle v. Vardill*, 7 Cl. & F. 895. See 6 HARV. L. REV. 379. This is followed in a few states only. *Lingen v. Lingen*, 45 Ala. 410; *Williams v. Kimball*, 35 Fla. 49; *Smith v. Derr*, 34 Pa. St. 126. *Contra*, *Caballero's Succession*, 24 La. Ann. 573; *Dayton v. Adkisson*, 45 N. J. Eq. 603; *Miller v. Miller*, 91 N. Y. 315; *DeWolf v. Middleton*, 18 R. I. 810.

⁴ *People v. Baker*, 76 N. Y. 78.

⁵ 201 U. S. 562. See 19 HARV. L. REV. 586.

⁶ See *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Matter of Hall*, 61 N. Y. App. Div. 266.

⁷ *Miller v. Miller*, *supra*; *Bates v. Virolet*, 33 N. Y. App. Div. 436.

contract so as to legitimate prior offspring *ab origine*. At birth the state of the father's domicile confers upon his natural child, not legitimacy, but the capacity to become legitimate,⁸ — and this irrespective of the situs of birth.⁹ This capacity is never lost. The state of the father's domicile at his marriage, if under the civil law, thereby ripens it into legitimacy from the beginning,⁸ — again irrespective of the situs of the ceremony.⁹ This is not the ordinary fiction of relation. The law opens its eyes wide to the facts, but allows a subsequent act to change their intermediate legal aspect. For legitimation *ab præsenti*, on the other hand, concurrence of two laws is not essential. The proper state may at any time by sovereign fiat confer legitimacy henceforth. This has been done by special legislative act¹⁰ or by general statute conditioned on such act of the parents as public acknowledgment or *de facto* adoption. Confusion arises from American statutes legitimating by subsequent marriage. If designed to follow the civil law and legitimate only *ab origine*, capacity would seem essential;¹¹ if designed to operate *ab præsenti*, non-essential. The latter has been the prevailing American view.¹² Serious international difficulty arises when parent and child have separate domiciles and either state seeks to legitimate *ab præsenti*. This is undoubtedly letting one state confer status on the subject of another, for legitimate fatherhood and illegitimate childhood co-existing is unthinkable. It is true that one state alone may divorce; but jurisdiction to dissolve status does not argue jurisdiction to create. Adoption in such case would seem impossible.¹³ Yet legitimacy differs from adoption and from other statuses in presupposing a natural relation, and this would seem enough to give either state power to confer it.¹⁴ Whether the other state recognized this status to the detriment of its subject would be a local question for it to decide.¹⁵

LIABILITY OF STOCKHOLDERS ON UNPAID STOCK SUBSCRIPTIONS. — Two theories have been advanced to account for the liability of a stockholder, who has received stock from the corporation at less than par, to make up the difference when called upon to do so by the creditors of the corporation. The "trust fund" theory, first advanced by Judge Story in 1824,¹ regarded the capital stock of a corporation as a trust fund for the creditors, to be protected as such. So, though the stockholder be released by the corporation from the liability to pay full par value, he is yet required to do so when called on by its creditors.² This theory has been justly criticised.³ While

⁸ *In re Grove*, 40 Ch. D. 216. See Dicey, Conf. of Laws, 497. Continental views are inharmonious. See Brocher, Droit Int. Privé, 153.

⁹ *Udny v. Udny*, L. R. 1 H. L. Sc. 441.

¹⁰ *Scott v. Key*, 11 La. Ann. 232. No English court has yet been called upon to recognize legitimacy *ab præsenti*.

¹¹ *Smith v. Kelly's Heirs*, 23 Miss. 167; *Fowler v. Fowler*, 131 N. C. 169.

¹² *Adams v. Adams*, 154 Mass. 290; *Caballero's Succession*, *supra*.

¹³ *Foster v. Waterman*, 124 Mass. 592.

¹⁴ *Blythe v. Ayres*, 96 Cal. 532. But see *Minor*, Conf. of Laws, 215; 65 L. R. A. 183, n.

¹⁵ *Irving v. Ford*, 183 Mass. 448.

¹ *Wood v. Dummer*, 3 Mason (U. S. C. C.) 308.

² *Scovill v. Thayer*, 105 U. S. 143.

³ *O'Bear Jewelry Co. v. Voller & Co.*, 106 Ala. 205. See *Hollins v. Brierfield Coal and Iron Co.*, 150 U. S. 371, 381.

solvent, the corporation has the entire interest, legal and beneficial, in all its property, of which the capital forms a part; and when it becomes insolvent, in the absence of a statute to the contrary, it may prefer any of its creditors.⁴ This is entirely inconsistent with the fundamental idea of a trust, which would require the corporation to deal with its legal title strictly for the benefit of all its creditors. And when, by a contract binding between the corporation and the stockholder, the latter is under no obligation to the corporation itself to make up the difference between what he paid for his stock and its par value, it is difficult to see where there is any *res* that is held in trust.

The other theory, which of late years has been rapidly supplanting the "trust fund" doctrine, bases the stockholder's liability on the ground of fraud, in the nature of deceit, for participating in the issue of stock purporting to be fully paid up, when in fact it is not. Persons who give credit to a corporation are presumed to rely on its stated capital as security for repayment. Therefore all who hold that capital out as fully paid up should be held to their representation.⁵ This theory readily explains why those who become creditors without notice subsequently to the issue of stock below par can collect⁶ the difference between the par value and what was paid, even though the stockholder is released by contract from any such obligation to the corporation itself, while those with notice⁷ and prior creditors⁸ cannot. This theory, too, may explain that series of cases which holds that a corporation, when embarrassed, for the purpose of carrying on its business may pay its debts or buy property with its stock at whatever the stock will bring without subjecting the taker to any further liability thereon even to creditors.⁹ The policy of allowing such a transaction under such circumstances outweighs the equity of the creditor who has relied on the stated capital.

The inquiry yet remains how far the situation at common law has been changed by statute. Under the common constitutional or statutory provision, that stock shall be issued only for money, labor, or property actually received, and that all fictitious increase of stock shall be void, the question seems to be whether the stock is fully paid or not. If this is decided in the negative, all the common law doctrines as to rights of creditors attach.¹⁰ A second class of statutes directs that each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid¹¹ upon the stock held by him. Some courts hold that this statute is but declaratory of the common law,¹² while others say that it imposes on the stockholder a liability to the creditor irrespective of when he became such or of his knowledge.¹³ A stricter form of this class of statutes requires the

⁴ McDonald v. Williams, 174 U. S. 397. See Nappanee Canning Co. v. Reid Murdock & Co., 60 N. E. Rep. 1068 (Ind., Ct. App.).

⁵ Hospes v. N. W. Mfg. & Car Co., 48 Minn. 174.

⁶ Camden v. Stuart, 144 U. S. 104; Martin v. South Salem Land Co., 94 Va. 28.

⁷ Coit v. Gold Amalgamating Co., 119 U. S. 343; Adamant Mfg. Co. v. Wallace, 16 Wash. 614.

⁸ Flinn v. Bagley, 7 Fed. Rep. 785.

⁹ Handley v. Stutz, 139 U. S. 417.

¹⁰ Van Cleve v. Berkey, 143 Mo. 109.

¹¹ As to whether anything remains unpaid where the stockholder gives substantial consideration in the nature of property or labor in good faith, see 19 HARV. L. REV. 366.

¹² First Nat'l Bank of Deadwood v. Guston-Minerva, etc., Co., 42 Minn. 327.

¹³ Sprague v. Nat'l Bank of America, 172 Ill. 149.

stockholder to make up the difference between what he paid for his stock and its par value. Under such a statute New Jersey has recently enforced liability in favor of a subsequent creditor with notice, notwithstanding that the stockholder had been released by the corporation from such liability and that the creditor had, as stockholder himself, assented to such release. *Easton Nat'l Bank v. American Brick and Tile Co.*, 64 Atl. Rep. 917 (Ct. Err. and App.). A very similar statute in Iowa, under similar circumstances, has received a contrary construction.¹⁴ The interpretation of the New Jersey court, however, seems best to accord with the policy against watered stock at which these statutes are aimed.

THE EFFECT OF FRAUD AND THE STATUTE OF FRAUDS ON PAROL DECLARATIONS OF TRUST. — We may first consider several situations where B, the person attempted to be made a trustee, is not fraudulent. First, when A conveys land absolutely to B, who orally agrees to hold it in trust for A, it is clear that the statute renders the express trust unenforceable. But since B is under a duty in conscience which he refuses to perform, equity should compel him to return the consideration he received therefor, — *i. e.*, enforce specific restitution. The constructive trust thus raised for A would be by operation of law, and so within the exception of the statute. Such is the law in England.¹ But the American courts, insisting rather blindly that such a trust is in the teeth of the statute, refuse to raise it.² They prevent total injustice, however, by permitting A to recover the value of the land.³ Secondly, when A conveys land absolutely to B, who orally agrees to hold it in trust for C, the American courts, again differing from the English, allow B to keep the land, insisting with still less justification that they would otherwise be nullifying the statute.⁴ B, conscionably, has no right to the land, and so a constructive trust should be raised for A, as in cases where an intended trust fails for other reasons.⁵ Thirdly, when A devises land absolutely to B, or agrees to remain intestate when B is his heir-at-law, with the parol understanding that B is to hold for C, it is the settled law, anomalous for England and doubly anomalous for America, that C may enforce the trust.⁶ Logically, the English doctrine in the preceding situations should be applied here also, with the result of raising a constructive trust for A's heirs, as when testamentary trusts fail for other reasons.⁷ The decision of the courts may be viewed as a specific enforcement of the agreement, with the statutory objection overcome by the strong equitable consideration that, as the testator is dead, in no other way could his wish to do something for C ever be carried out.⁸ Fourthly, if A execute to B, his heir apparent, what they both believe to be a valid conveyance, with the parol agreement that

¹⁴ Callanan v. Windsor, 78 Ia. 193; State Trust Co. v. Turner, 111 Ia. 664.

¹ Booth v. Turle, L. R. 16 Eq. 182.

² Hubbard v. Sharp, 11 N. Y. St. Rep. 802.

³ Cromwell v. Norton, 79 N. E. Rep. 433 (Mass.).

⁴ Peterson v. Boswell, 137 Ind. 211. *Contra*, McKinney v. Burns, 31 Ga. 295. See 3 Pomeroy, Eq. Jurisp., § 1056 (3).

⁵ St. Paul's Church v. Attorney-General, 164 Mass. 188.

⁶ Russell v. Jackson, 10 Hare 204; Will of O'Hara, 95 N. Y. 403, 413. *Contra*, Moore v. Campbell, 102 Ala. 445; Bedilian v. Seaton, 3 Wall. Jr. (U. S. C. C.) 279, 285.

⁷ Will of O'Hara, *supra*.

⁸ See Bedilian v. Seaton, *supra*, 286.

B is to hold in trust for C, and it is found after A's death that the conveyance was void, it would seem that B, as heir, should be held to have the land free from any trust, since he does not get the land directly by reason of the agreement.

When, however, B is fraudulent, the question is entirely changed. Then the American courts find no difficulty in raising a constructive trust for A in the first situation,⁹ and for C in the second.¹⁰ That this result should be attained is generally conceded, but the reasons usually advanced therefor are not especially satisfactory. The courts commonly say that they will not allow the statute to be made an instrument of injustice. But that is loose, and, as is shown above, hardly veracious. A text-writer suggests that equity thereby punishes the wrongdoer and takes away his ill-gotten gains.¹¹ But it is not one of equity's rôles to play assistant to criminal law. It is believed that the true explanation is that equity thereby gives specific reparation of B's tort. To accomplish this, it must give the intended *cestui* the beneficial interest he was to have, and thus is raised what is truly a trust by operation of law. Applying this to the third situation, we see that the position of the courts in making B, when fraudulent, a constructive trustee for C is entirely logical, except that courts sometimes go rather far to find this fraud. A similar result is reached in the fourth situation when B is fraudulent. Except for B's fraud, A would have made some other disposition of the land for the benefit of C, and in order specifically to repair the harm resulting from his wrong, B, though taking as heir, should be made a constructive trustee for C. It was so held in a recent case. *Crossman v. Keister*, 79 N. E. Rep. 58 (Ill.). This combination of facts is apparently novel, but the decision is a correct application of logical principles.

STATUTORY INDICTMENT IN A COUNTY OTHER THAN THAT WHERE THE CRIME WAS COMMITTED. — How far does the federal Constitution restrain a state from modifying its criminal procedure? A recent case raises the question whether a state may provide that indictments for lynching shall be found by the grand jury of a county adjoining the one where the crime was committed, and holds such a statute constitutional. *State v. Lewis*, 55 S. E. Rep. 600 (N. C.). The section of the Constitution which confers and defines the judicial power of the United States, and incidentally provides that the trial of all crimes except impeachment shall be by jury,¹ obviously applies only to the federal government. The same is true of the first ten amendments, including the Fifth and Sixth, which provide specifically for an indictment by a grand jury and trial by a petit jury.² These restrictions have not been extended to the states by the Fourteenth Amendment.³ The question, then, is whether any particular modification is a denial of "due process of law" under that amendment.

The words "due process of law," as used in both the Fifth and Fourteenth Amendments, have been held equivalent to "law of the land" in

⁹ *Brison v. Brison*, 75 Cal. 525.

¹⁰ *Goldsmith v. Goldsmith*, 145 N. Y. 313.

¹¹ 3 *Pomeroy*, Eq. Jurisp., § 1056 (3).

¹ Art. III. § 2.

² *Barron v. Mayor, etc., of Baltimore*, 7 Pet. (U. S.) 243; *Brown v. New Jersey*, 175 U. S. 172.

³ *Slaughter House Cases*, 16 Wall. (U. S.) 36.

Magna Charta.⁴ If, therefore, a particular procedure is not expressly or by implication forbidden by other parts of the Constitution, the fact that such procedure was a part of the English common or statute law at the time the Constitution was adopted is strong evidence that it is not a denial of "due process."⁵ The present statute seems to fall in this class. True, a grand jury could not regularly inquire of a fact done outside the county for which it was sworn; but this rule was modified by some eighteen exceptions, the earliest of which date from Henry VIII.⁶ Indeed, the statute in that reign which provided that counterfeiters, etc., might be indicted and tried for their offenses, committed in Wales, in the next adjoining county of England,⁷ is exactly in point as to the present statute. Thus even if "due process of law" be taken to mean common law procedure at the time the Constitution was adopted, an extremely narrow construction, the present statute seems proper.

There is, it is true, some authority supporting the view just noted,⁸ but the Supreme Court has taken one less rigid. Thus a state may substitute prosecution by information for prosecution by indictment,⁹ and thereby eliminate the grand jury altogether. A simplified form of the indictment may be prescribed, so long as it charges the essential elements of the crime.¹⁰ And even a provision for a petit jury of eight to try a felony is proper.¹¹ In state courts a provision for a grand jury of less than the common law number of jurors has been upheld.¹² It seems clear, therefore, that when the Constitution guaranteed to the citizen "due process of law," it did not crystallize the then common law procedure and adopt it as if such procedure had been specifically described. The provision leaves a wider scope. It was intended to protect the individual from the arbitrary exercise of the powers of government. But so long as the substantial rights of the citizen were not invaded, the forms by which he was to be protected might be modified to suit new conditions. So, even if the present statute were not proper as prescribing an ancient procedure, it seems clearly to fall within this general power.

CONTRACT BY STATE NOT TO DISCRIMINATE AGAINST FOREIGN CORPORATIONS. — Though it is beyond the power of a state to bargain away its police power¹ or its right of eminent domain,² by a line of judicial decision, not without emphatic and persistent dissent, it may irrevocably restrict or part with its power to tax.³ Whether such contract be by general law or by

⁴ *Den d. Murray v. Hoboken, etc., Land Co.*, 18 How. (U. S.) 272; *Davidson v. New Orleans*, 96 U. S. 97.

⁵ *Den d. Murray v. Hoboken, etc., Land Co.*, *supra*.

⁶ See 4 Bl. Com. 303.

⁷ 26 Hen. VIII c. 6.

⁸ *Jones v. Robbins*, 8 Gray (Mass.) 329.

⁹ *Hurtado v. California*, 110 U. S. 516; *McNulty v. California*, 149 U. S. 645.

¹⁰ *Caldwell v. Texas*, 137 U. S. 692.

¹¹ *Maxwell v. Dow*, 176 U. S. 581.

¹² *People v. Parker*, 13 Colo. 155; *Hausenfluck v. Com.*, 85 Va. 702.

¹ *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78. See Freund, *Police Power*, § 362.

² See *Lock Haven Bridge Co. v. Clinton County*, 157 Pa. St. 379.

³ *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430. See Judson, *Taxation*, §§ 39-58.

special, mutual assent and consideration must plainly appear.⁴ There is the further rule, rigidly applied, that all fair doubts be resolved in favor of the state.⁵ To foreign corporations a contract with the state is of vital interest. Unhampered by the "privileges and immunities" clause, a state may exclude them altogether,⁶ may impose onerous conditions of admission,⁷ may discriminate against them in tax or regulation,⁸ and in so far as it does not deprive them of vested property or contract rights may revoke their licenses at will.⁹ The law of foreign corporations is recent, and the cases are few where courts have passed upon their agreements with states. But it is in each case a question of fact, for determination from the enacting language and attendant circumstances, whether a revocable license has been granted⁹ or a solemn contract made.¹⁰ The United States Supreme Court has recently passed upon an interesting case of this nature. A New Jersey corporation, capitalized at one hundred millions, paid fifteen thousand dollars to enter Colorado under a statute providing that foreign corporations should be subject to "all the liabilities, restrictions and duties which are or may be imposed upon" similar domestic corporations and "have no other or greater power." This, by a bare majority, was held to constitute a contract not to discriminate against the foreign corporation, the obligation of which was impaired by a subsequent franchise tax double that imposed upon domestic corporations. *Am. Smelting & Refining Co. v. Colorado*, Jan. 7, 1907.

If, as Justice Peckham declares, the contract arose when the entrance fee was paid, subsequent expenditures in the state on the faith thereof, however large, formed no part of the consideration. Nor does a license necessarily become a contract because the fee exacted is large. And in considering the size of this fee the enormous capitalization here represented must be borne in mind. Granted, moreover, that the fee shows Colorado to have contracted not to revoke the license for twenty years (the statutory life of corporations) save for cause, it is another matter to spell out a contract to make no discrimination in favor of domestic corporations during that period. To say, "You shall have all the burdens and no greater privileges," would seem naturally to mean, "You shall never be better off," rather than, "You shall be neither better off nor worse off" than domestic corporations. At best there would seem to be a fair doubt, which by the general rule should be resolved in the state's favor.⁶ And though, as the court points out, this contract is not one of tax-exemption, this rule still applies. Facts undisclosed in the opinion may have affected the decision of the majority.

Non-discrimination in "liabilities, restrictions and duties" includes police power as well as taxation. Conditions may be easily imagined where the public welfare would demand restrictions upon foreign corporations heavier than upon domestic corporations in the same line of business. Though such part of the contract might therefore be objectionable, the part as to

⁴ *Grand Lodge v. New Orleans*, 166 U. S. 143.

⁵ *Metropolitan Street Ry. Co. v. New York*, 199 U. S. 1. See *Am. Smelting & Refining Co. v. People*, 82 Pac. Rep. 531 (Colo.).

⁶ *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28.

⁷ *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246.

⁸ *Southern Bldg. & Loan Ass'n v. Norman*, 98 Ky. 294.

⁹ *Home Ins. Co. v. Augusta*, 93 U. S. 116; *Com. Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602.

¹⁰ *N. W. Telephone Exchange Co. v. Anderson*, 12 N. D. 585; *Com. v. Mobile & Ohio Ry.*, 64 S. W. Rep. 451 (Ky.). See *Erie Ry. v. Pennsylvania*, 153 U. S. 628.

taxation, though expressed in the same phrasing, could still stand.¹¹ While the four justices assign no reason for their dissent, it is fair, therefore, to assume that they could find no contract in fact.

THE EXTENT OF THE PROTECTION AFFORDED THE DOWER RIGHT. — It has just been decided in Utah, apparently for the first time anywhere,¹ that a widow whose husband has conveyed away land without her consent cannot recover from his estate after his death the value of her dower in the land thus disposed of. *In re Park's Estate*, 87 Pac. Rep. 900. The case may be explained on the ground that she suffered no damage. But the reasoning on which the court proceeded — that dower rights are only against the land — suggests the question whether they are always so limited.

Dower was early considered a mere inchoate right, not so high as an interest in land.² But more recently many incidents of property have been given to it,³ and now the decidedly prevalent view is that "it is a subsisting and valuable interest which will be protected and preserved."⁴ The difficulty whether the interest will be extended beyond the land itself arises especially in two classes of cases: when a mortgage on the land is foreclosed, and when the land is put to a public use. As to the wife's rights when her interest in the land is destroyed by the foreclosure of a pre-nuptial mortgage, or of one in which she joined, a serious conflict exists. The widow's right to dower in an equity of redemption is now almost universally recognized,⁵ though formerly it was otherwise.⁶ But when the foreclosure takes place during the husband's life, at least three results have judicial sanction. Some courts give the wife no rights in the proceeds of the sale. It is argued that her joining in the mortgage interrupts, with her consent, the seisin of her husband, and without this seisin dower cannot exist;⁷ also, that dower, being but an interest in the husband's title, is destroyed when that is defeated by the mortgagee's paramount title and turned into personalty.⁸ These grounds⁹ are rather technical, and so other courts, proceeding more on equitable considerations, give the wife a right in the surplus. They justly say that she had an interest in the equity of redemption, and when this is changed into money, her interest should attach

¹¹ *Mayor of Hagerstown v. Dechert*, 32 Md. 369.

¹ See *Miller v. Farmer's Bank*, 49 S. C. 427, 436 (*semble*, that if a husband alone executes a mortgage, which is foreclosed after his death, the widow's rights are only against the land).

² See *Moore v. Mayor of New York*, 8 N. Y. 110.

³ *Simar v. Canady*, 53 N. Y. 298 (the wife has an action against one who fraudulently induced her husband and herself to convey); *Porter v. Noyes*, 2 Me. 22 (the existence of the right defeats a covenant to give an unincumbered title); *Buzick v. Buzick*, 44 Ia. 259 (the wife can bring a bill to protect it from fraud). See, also, *Clifford v. Kampfe*, 147 N. Y. 383; *Sykes v. Chadwick*, 18 Wall. (U. S.) 141.

⁴ *Simar v. Canady*, *supra*, 304. *Contra*, *Virgin v. Virgin*, 189 Ill. 144, 151.

⁵ *Snow v. Stevens*, 15 Mass. 278. *Contra*, *In re Thompson's Estate*, 6 Mackey (D. C.) 536.

⁶ 4 Kent, Com., 43, 44.

⁷ *Grube v. Lilienthal*, 51 S. C. 442.

⁸ *Newhall v. Lynn Savings Bank*, 101 Mass. 428.

⁹ For weaker grounds, see *George v. Hess*, 48 W. Va. 534; *Kauffman v. Peacock*, 115 Ill. 212.

to the proceeds on principles analogous to equitable conversion.¹⁰ This interest is usually protected by ordering a third of the surplus to be invested.¹¹ At least one court takes the third view that the wife mortgages her interest merely as surety for her husband, and protects her interest in the entire proceeds accordingly.¹² The first two views have almost equal support, but the last is generally discredited.¹³ It should be remembered that a distinction might well be made between a mortgage which gives only a lien and one which passes title.

In the second class of cases mentioned, if a husband dedicates his land to the public, and it is accepted, the dower is destroyed.¹⁴ To make it of any value to the widow would seriously inconvenience the public, and "the public [right] shall be preferred before the private."¹⁵ Similarly, when a husband grants to a railroad for public use, the dower is gone.¹⁶ When the state, or a railroad, takes land by eminent domain, it holds free from dower, though the wife was not a party to the proceedings. An early case states the ground to be that all the interest is in the husband.¹⁷ But as the wife is now deemed to have a valuable interest, a better explanation is that this interest, not arising to an estate, is represented in the fee of the husband for purposes of condemnation and compensation.¹⁸ It is well settled, however, that the wife's interest will be transferred from the land to the money given for it, and will be secured therein.¹⁸ When the husband dedicates his land to the public, whether his wife would have against him any action, legal or equitable, is a question which seems not yet to have arisen. It is believed that he thus destroys a subsisting right of hers, for which she should have compensation.

UNCONSTITUTIONALITY OF THE AMENDMENT TO THE NEW YORK STOCK TRANSFER TAX. — On the ground of being in conflict with the constitutional provision for equal protection of the laws, New York has recently declared invalid an act imposing a stamp tax of two cents a share on the transfer of stock. *People ex rel. Farrington v. Mensching*, 187 N. Y. 8. This was a privilege tax, and to such a tax the requirement for equal protection of the laws applies.¹ Just as with a property tax one individual should not be assessed on his goods more, without a reason, than another individual of the same class on goods of equal value, so it is an unequal burden for the state to charge one person more for the same privilege than it charges another. The fault found with the statute in question is obviously of this sort. The privilege of transferring a hundred shares, worth a dollar a share, is no more valuable than the privilege of transferring one share worth a hundred dollars; yet the tax imposed in one case was two dollars and in

¹⁰ *Denton v. Nanny*, 8 Barb. (N. Y.) 618.

¹¹ *Vreeland v. Jacobus*, 19 N. J. Eq. 231. But *cf.* *Matter of Brooklyn Bridge*, 75 Hun (N. Y.) 558.

¹² *Mandel v. McClave*, 46 Oh. St. 407.

¹³ *Burnet v. Burnet*, 46 N. J. Eq. 144.

¹⁴ *Duncan v. Terre Haute*, 85 Ind. 104.

¹⁵ Co. Lit. 31 *b*.

¹⁶ *Venable v. Wabash, etc., R. R. Co.*, 112 Mo. 103.

¹⁷ *Moore v. Mayor of New York*, *supra*.

¹⁸ *Wheeler v. Kirtland*, 27 N. J. Eq. 534. *Cf.* *Canty v. Latterner*, 31 Minn. 239.

¹ *State v. Ferris*, 53 Oh. St. 314, 337; *Magoun v. Illinois, etc., Bank*, 170 U. S. 283, 300.

the other two cents. The holders of shares of low value were thus placed in a class assessed more heavily than the class of holders of shares of high value.²

Undoubtedly, much latitude is allowed legislatures in classifying the subjects of taxation; and probably the courts are more ready to see a possible reason for the classification made, even if convinced of its error themselves, than in any other sort of case introducing complaint as to unequal protection of the laws.³ And to privilege taxes especial freedom has been given. License taxes for occupations are supported, though not graduated on the extent of the business of the different individuals of the same occupation.⁴ A stamp tax may be imposed on agreements to sell made at exchanges, while not on agreements to sell made elsewhere.⁵ And in the case of taxing the transfer of stocks or bonds, the classification of the values of the privileges taxed may be even on the basis of the securities' face value. This, though unquestionably unfair in cases where the real worth has fallen below par, is held to be a reasonable means of ascertaining the value of the privilege exercised, — this result being backed, no doubt, by the practical difficulty of determining the real value of such securities by any method.⁶ An earlier form of the law, to which the statute complained of was an amendment, had been to this effect, and accordingly had been upheld.⁷ But the amendment sought to make a classification that was fanciful and arbitrary. If only the tax had been for this fixed amount on the transfer of each certificate instead of on the transfer of each share, it might perhaps have been upheld on the analogy of the war stamp tax imposed by the federal government on every check for whatever amount drawn. But, as it was framed for the transfer of shares, a transferor was taxed little or much according to the accident of the division of his corporate securities into a less or greater number of shares. The possibility of a valid reason for not making the rate per cent an equal burden on all, for the lack of which courts are constrained to declare such statutes unconstitutional, was absent.

RECENT CASES.

ADMIRALTY — JURISDICTION — SUIT FOR HIRE OF DREDGE. — A sea-going hydraulic dredge which operated afloat was employed to mix and pump silt from a navigable river to certain meadow lands. Suit was brought for its hire. *Held*, that the non-maritime character of the employment does not oust admiralty of its jurisdiction. *Bowers Hydraulic Dredging Co. v. Federal Contracting Co.*, 148 Fed. Rep. 290 (Dist. Ct., S. D. N. Y.).

The court intimates that it would have refused jurisdiction in this case, but for a holding of the United States Supreme Court, in a case of damage caused to a structure by a ship, that the distinction between fixed and floating structures is artificial. *The Blackheath*, 195 U. S. 361. But that case is not directly in

² But *cf.* *Cox v. Texas*, 202 U. S. 446, 450.

³ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562, 563.

⁴ *St. Louis v. Sternberg*, 69 Mo. 289; *Cooley, Taxation*, 3 ed., 261.

⁵ *Nicol v. Ames*, 173 U. S. 509.

⁶ *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232.

⁷ *People ex rel. Hatch v. Reardon*, 184 N. Y. 431; *aff. in U. S. Sup. Ct.*, Jan. 7, 1907. See 19 HARV. L. REV. 460.

point. Neither case suggests a satisfactory test of what determines the jurisdiction of admiralty over floating structures, nor do the numerous cases involving dredges establish any definite criterion. The cases mention, as tending to establish admiralty jurisdiction, capacity to navigate, employment in dredging harbors, and the fact that dredges are usually adjuncts to scows used in transporting the dredged material. See *The Alabama*, 22 Fed. Rep. 449; *The Starbuck*, 61 Fed. Rep. 502. But it is believed that the proper test is independent of the nature of the employment, — that it is whether the dredge is capable of moving about upon navigable waters. See *McMaster v. One Dredge*, 95 Fed. Rep. 832. The theory of such test is that as the mobility of a structure on navigable waters subjects it to all the admiralty rules which govern other craft as to lights, collisions, salvage, etc., it should therefore be subject to general admiralty jurisdiction. *The Floating Elevator Hezekiah Baldwin*, 8 Ben. (U. S.) 556; *Saylor v. Taylor*, 77 Fed. Rep. 476; cf. U. S. REV. STAT. § 3; *De Louis v. Boit*, 2 Gall. (U. S.) 398.

ADVERSE POSSESSION — CONTINUITY — PRESUMPTION OF AGENCY FROM RELATION OF PARENT AND CHILD. — A statute gave title to one holding land adversely for seven years with color of title. The plaintiffs claimed as heirs of a deceased sister who at her death had color of title, but not possession. After her death the plaintiff's father entered adversely to the defendants, the true owners. On his death the plaintiffs entered, but had not yet occupied for seven years. *Held*, that the plaintiffs cannot avail themselves of their father's possession. *Barret v. Brewer*, 55 S. E. Rep. 414 (N. C.).

As color of title is probably inheritable, the plaintiffs apparently possessed one of the two statutory requirements. See *Sears v. McBride*, 70 N. C. 152; *Neal v. Bartleson*, 65 Tex. 478. The question being then as to possession, the plaintiffs' title depended on whether they could take advantage of their father's possession, which was possible only if their father held under their color of title as their agent. In the absence of direct evidence that the father held as agent, the theory was advanced that a presumption of agency arose from the relationship, in view of the duty of a parent to safeguard the interests of his children. It has been held that there is a presumption of permission by the child when a parent occupies his child's land. *O'Boyle v. McHugh*, 66 Minn. 390. But the better view is that even such a presumption is unjustified and that the fact of relationship may simply modify evidence otherwise convincing. *Allen v. Allen*, 58 Wis. 202. And, in general, relationship is held to create not even a rebuttable presumption of agency. *Francis v. Reeves*, 137 N. C. 269; *Ritch v. Smith*, 82 N. Y. 627.

BANKRUPTCY — PRIORITY OF CLAIMS — ASSIGNMENT BY WAGE-EARNER. — § 64 of the Bankruptcy Act of 1898 enumerates among debts accorded priority, "wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed \$300 to each claimant." *Held*, that one to whom such claim was assigned before the commencement of bankruptcy proceedings is entitled to priority of payment. *Shropshire, Woodliff & Co. v. Bush*, U. S. Sup. Ct., Jan. 7, 1907.

This is the first decision of the Supreme Court on this matter. It is clear that if the assignment had occurred after the commencement of the bankruptcy proceedings the assignee would be entitled to priority. *In re Campbell*, 102 Fed. Rep. 686. The present decision, however, must rest on the ground that the priority is attached to the debt and not to the person of the wage-earner, the statute merely describing the nature of the debt given priority. Courts reaching a different result have followed the precise language of the statute, holding that the wages must be "due to workmen, clerks and servants" when the bankruptcy occurred, if priority is to be allowed. *In re Westland*, 99 Fed. Rep. 399. This practically deprived the wage-earner of the assignability of his claim, a valuable right. Thus, while professing to construe the statute to protect him, the courts defeated their purpose. See *In re Harmon*, 128 Fed. Rep. 170. The principal case arrives at a more desirable construction of the clause,

more in accord with its spirit and not doing violence to its language. Though the weight of lower court decisions was against this result, it is not without support. *In re Brown*, 4 Fed. Cas. 1974; *In re Harmon*, *supra*.

BANKRUPTCY — PROOF OF CLAIM — FILING OF PROOF. — *Held*, that the presentation and delivery of proofs of claim to the trustee in bankruptcy within the year after the adjudication is a filing within the Bankruptcy Act, except as regards personal claims of the trustee, which must be filed with the referee within the year. *J. B. Orcutt Co. v. Green*, U. S. Sup. Ct., Jan. 7, 1907.

The result reached by the court is practical and seems justified by § 30 of the Act and General Order 21.

BANKRUPTCY — RIGHTS AND DUTIES OF BANKRUPT — TITLE BEFORE APPOINTMENT OF TRUSTEE. — The federal Bankruptcy Act provides that the trustee of the estate of a bankrupt upon his qualification "shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt." In bankruptcy proceedings brought against him the plaintiff had failed to disclose any property, and no trustee was appointed. After his discharge he brought action in a state court for the value of services rendered prior to the bankruptcy proceedings. *Held*, that the plaintiff may maintain this action. *Rand v. Iowa Central R. R. Co.*, 78 N. E. Rep. 574 (N. Y.).

The view has been expressed that during the period between adjudication of bankruptcy and the appointment of a trustee the property is in the custody of the law. *Rand v. Sage*, 94 Minn. 344; see COLLIER, BANKRUPTCY, 5 ed., 553. In the absence of any formal taking charge of the property such a theory seems untenable. The better view is that until the appointment of a trustee title remains in the bankrupt, but on the happening of that event the statutory provision requires that the rights of all parties be settled as though title had been in the trustee since the adjudication. *Cf. Bank v. Sherman*, 101 U. S. 403; *Bryan v. Bernheimer*, 181 U. S. 188. Thus in the principal case, though the bankrupt apparently has at present a legal right to sue, payment to him by the debtor would not protect the latter against suit by a later appointed trustee. The defendant, then, should be given some protection. It is possible that the debtor could protect himself by securing the appointment of a trustee before paying the judgment. If he is unable immediately to secure this, the court should protect him against further liability either by the form given to the original judgment or by a temporary injunction. *Cf. Griffin v. Mutual Life Ins. Co.*, 119 Ga. 664.

BROKERS — STOCKS CARRIED ON MARGIN — NATURE OF TRANSACTION. — A broker bought and sold stock on margin for the defendants. Within four months before his bankruptcy a balance was struck in the account, which showed that he held stock for the defendants of a certain value, and that the defendants were indebted to him to a less amount. This the defendants paid and received the stock. The broker's trustee in bankruptcy brought suit to recover the stock, on the ground that title to it was in the broker and that its return to the defendants was a preference. *Held*, that title to the stock was in the customers, and that the defendants were not creditors within the meaning of the Bankruptcy Act of 1898, c. 541, § 1 (9). *Richardson v. Shaw*, 147 Fed. Rep. 659 (C. C. A., Second Circ.).

For a discussion of the principles involved, see 19 HARV. L. REV. 529. *Cf.* also 7 *ibid.* 183; 15 *ibid.* 78.

CONFLICT OF LAWS — LEGITIMACY AND ADOPTION — LEGITIMATION SUBSEQUENT TO BIRTH. — A New York man deserted his wife and purported to marry a New Jersey woman, who bore him two children. Thereafter he became domiciled with his family in Michigan, obtained a divorce there from his New York wife without personal service and by default, and went through a second marriage ceremony with the New Jersey woman. This divorce and remarriage a New York court by decree refused to recognize. By Michigan law illegitimate children become legitimate by the subsequent marriage of their parents.

The children claimed New York realty under a devise as the "lawful issue" of their father. *Held*, that they do not take. *Olmsted v. Olmsted*, 51 N. Y. Misc. 309. See NOTES, p. 400.

CONFLICT OF LAWS — MARRIAGE — JURISDICTION FOR NULLIFICATION. — A, an Englishwoman, was married in England to B, a domiciled Frenchman. This marriage was pronounced void by the French court, on the ground that B, who was not of full age by French law, had not obtained his parents' permission to marry. A then married C in England. C sought a decree of nullity on the ground that, as the French court had been without jurisdiction, A was still the wife of B. *Held*, that the marriage be annulled. *Ogden v. Ogden*, 23 T. L. R. 158 (Eng., P. D., Dec. 10, 1906).

A decree of annulment declaring, as it does, that no valid marriage ever existed, should be pronounced only by a court of the sovereign which purported to create the marriage. The difficulty lies in determining what is in fact such creating sovereign. The simplest view, and that prevalent in the United States, is that the jurisdiction where the ceremony was performed creates the marriage, and alone can annul. *Cumington v. Belchertown*, 149 Mass. 223. The English view, however, seems to be that if either party is domiciled in England that law alone applies; otherwise, the law of the husband's domicile at the time of the marriage. See *Johnson v. Cooke*, [1898] 2 Ir. 130; 13 HARV. L. REV. 604. This view often leads to the indefensible result that two countries are capable of creating and hence of annulling the marriage when the contracting parties are domiciled in different jurisdictions. See *Bater v. Bater*, 21 T. L. R. 517; DICEY, CONF. OF LAWS, 394. The illogical feature of the English view, in that it applies a peculiar rule to domiciled Englishmen, is brought out in the present case. The case is plainly right on the United States theory; indeed the language of the opinion is apparently based upon it. Cf. *Linke v. Van Aerde*, 10 T. L. R. 426; see DICEY, CONF. OF LAWS, 276, 277.

CONSTITUTIONAL LAW — CLASS LEGISLATION — STOCK TRANSFER TAX. — A New York statute imposed "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfer of shares or certificates of stock in any domestic or foreign . . . corporation . . . on each share of one hundred dollars of face value or fraction thereof," a tax of two cents. *Held*, that the tax is unconstitutional. *People ex rel. Farrington v. Mensching*, 187 N. Y. 8. See NOTES, p. 408.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — STATUTORY INDICTMENT IN ADJOINING COUNTY. — A statute provided that an indictment for lynching should be brought by the grand jury of a county adjoining that where the crime was committed. The defendant moved to quash such an indictment on the ground that the statute was unconstitutional. *Held*, that the statute is valid. *State v. Lewis*, 55 S. E. Rep. 600 (N. C.). See NOTES, p. 404.

CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACTS — CONTRACT BY STATE NOT TO DISCRIMINATE AGAINST FOREIGN CORPORATION. — A statute imposed a graduated entrance fee upon foreign corporations, and provided that they should be subject to "all the liabilities, restrictions and duties which are or may be imposed upon" similar domestic corporations, and "have no other or greater power." The life of domestic corporations was twenty years. A foreign corporation paid the fee and entered the state. Three years thereafter the state imposed twice as heavy a license tax on foreign as on domestic corporations. *Held*, that this tax impairs the obligation of a contract by the state not to discriminate against the foreign corporation for twenty years. Four justices dissented. *Am. Smelting & Refining Co. v. Colorado*, U. S. Sup. Ct., Jan. 7, 1907. See NOTES, p. 405.

CONSTRUCTIVE TRUSTS — EFFECT OF STATUTE OF FRAUDS — EFFECT OF FRAUD. — A, shortly before his death wishing to give certain land to the plaintiff, a daughter, did what he and the defendant, another daughter, thought was

effective to pass the legal title to it to the latter, upon her oral promise to hold it in trust for the plaintiff. A died intestate, and it was then discovered that the title to the land had not passed out of him. The defendant, whose intentions throughout the entire transaction had been fraudulent, refused to recognize the trust as to her interest as heiress-at-law. The plaintiff filed a bill to compel her to recognize the trust. *Held*, that because of the defendant's fraud the Statute of Frauds has no application, and the plaintiff's prayer should be granted. *Crossman v. Keister*, 79 N. E. Rep. 58 (Ill.). See NOTES, p. 403.

CONTEMPT — NATURE OF PROCEEDINGS — DISOBEDIENCE BY BANKRUPT. — In contempt proceedings for failure to obey a court order to deliver property to trustees, a bankrupt declared that she had no property. *Held*, that such proceedings are criminal in nature and contempt must be proved beyond a reasonable doubt. *Moody v. Cole*, 148 Fed. Rep. 295 (Dist. Ct., Dist. Me.).

For a discussion of the principles involved, see 20 HARV. L. REV. 233.

CONTRACTS — DEFENSE OF IMPOSSIBILITY — FRAUDULENT CONCEALMENT BY PLAINTIFF. — The defendant contracted to sell the plaintiff coal from a designated colliery for shipment to Australia. The defendant had already contracted with the colliery for coal. Before either contract the colliery had agreed to sell for shipment to Australia to another dealer exclusively. This the plaintiff knew, but did not disclose to the defendant. On learning of the defendant's contract with the plaintiff, the colliery refused delivery, making the defendant's performance impossible. *Held*, that the plaintiff was guilty of fraudulent concealment and that the defendant is entitled to rescind. *Scott, Fell & Co. v. Lloyd*, 6 S. R. (N. S. W.) 447.

The reasoning of the decision goes beyond the present state of the authorities. Ordinarily, where means of information are within the reach of both, one of the contractors is not bound to disclose to the other facts which if known would influence his action. The rule is based largely on the difficulty in the application of a contrary one. See *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178; but *cf. Barwick v. Eng., etc., Bank*, L. R. 2 Exch. 259. Aside from cases of fiduciary relations, the giving of a defense in exceptional circumstances seems to be governed by the court's sense of fairness rather than by any well-defined rule. See *Dambmann v. Schulting*, 75 N. Y. 55. An intention to reap self-benefit will not alone create a duty of disclosure. *Neill v. Shamburg*, 158 Pa. St. 263. Recent cases have distinguished suppression of a fact when inquiry is made from mere silence, giving a defense in the former case. *Turner v. Green*, [1895] 2 Ch. 205. The court seems justified, however, in making in the present case an additional exception to the general rule. For where, as here, one person induces another to contract with him, not disclosing his private knowledge of facts which will probably make performance an impossibility, and it subsequently becomes so, he should be without remedy for the non-performance. *Cunningham v. Dunn*, 3 C. P. D. 443.

CORPORATIONS — CORPORATIONS DE FACTO — SALE OF STOCK. — The plaintiff purchased stock in the defendant corporation, relying on an incorrect statement by its secretary that it had been legally incorporated. *Held*, that the plaintiff is entitled in equity to a rescission of the sale. *Maine v. Midland Investment Co.*, 109 N. W. Rep. 801 (Ia.).

This case appears to be inconsistent with a somewhat similar case in the same jurisdiction which was discussed in 20 HARV. L. REV. 327.

CORPORATIONS — DISTINCTION BETWEEN CORPORATION AND ITS MEMBERS — LIABILITY FOR ACTS OF NEW CORPORATION FORMED BY MEMBERS OF OLD. — The plaintiff was injured through negligent construction work alleged to have been sublet by the defendant corporation to the Atlantic Co., a corporation without capital formed by the members of the defendant corporation. The consideration was to be one-half per cent above the actual cost of the work. The object of the whole transaction was confessedly to avoid attachments. The jury were instructed that if the subletting was not *bona fide*, but

fictitious, in order to relieve the defendant from ordinary legal liabilities, and the defendant was really controlling the work, the verdict should be for the plaintiff. *Held*, that these instructions correctly submitted the question to the jury. *Holbrook, etc., Corp. v. Perkins*, 147 Fed. Rep. 166 (C. C. A., First Circ.).

Reference was recently here made to decisions sometimes, though erroneously, as it was contended, supposed to involve a disregard of the corporate entity. See 20 HARV. L. REV. 223. The point taken seems neatly illustrated by the present case; for the court, although quoting a statement that the corporate entity might sometimes be disregarded, finally placed its decision upon the valid ground that "the arrangement . . . was merely a piece of circumvention which may be regarded either as a nullity or as making the Atlantic Construction Co. the agent or *alter ego* for whose acts the defendant as true principal is liable." That the result does not hinge upon an analysis of the component members of the corporate entity seems clear; for if, for example, in the present case a corporation composed of other individuals, or a man of straw, were substituted for the Atlantic Co., the result would certainly be unchanged. See *McNeil, etc., Co. v. Crucible, etc., Co.*, 207 Pa. St. 493. The inference, then, is natural that the only force of the identity of the members of the two corporations is as evidence that the independent contractor agreement was merely colorable.

CORPORATIONS — STOCKHOLDERS' INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — LIABILITY ON UNPAID STOCK SUBSCRIPTIONS. — A statute provided that where stock was issued below par the stockholder was bound to pay the sum necessary to complete the par value if required to satisfy the debts of the company. A took stock in a corporation at a value below par, on the agreement that he was subject to no further liability thereon. B, who participated in this transaction as a stockholder, later became a creditor of the corporation. The corporation became insolvent. *Held*, that B may recover from A the difference between what A paid for his stock and its par value. *Easton Nat'l Bank v. Am. Brick and Tile Co.*, 64 Atl. Rep. 917 (N. J., Ct. Err. and App.). See NOTES, p. 401.

CORPORATIONS — STOCKHOLDERS' RIGHTS INCIDENT TO MEMBERSHIP — RIGHT OF PREÉMPTION. — The majority stockholders of the defendant corporation voted to double the capital stock and to sell all the shares to an outsider at \$450 a share — four and one-half times their par value. The plaintiff, a dissenting stockholder, was refused an opportunity to purchase the same proportion of the new stock that he held of the old stock. *Held*, that the plaintiff may recover from the corporation the difference between the fixed selling price and the market value on the day of the sale of his proportionate share of the new stock. *Stokes v. Continental, etc., Co.*, 36 N. Y. L. J. 589 (N. Y., Ct. App., Nov. 13, 1906). See NOTES, p. 398.

CRIMINAL LAW — SENTENCE — REMANDING FOR NEW SENTENCE. — On an indictment for murder the defendant was found guilty of manslaughter. Upon a new trial granted on appeal he was found guilty of murder, and was sentenced to a longer imprisonment than could be imposed in the case of manslaughter. The defendant appealed. *Held*, that the case be remanded with directions to sentence for manslaughter. *People v. Farrell*, 109 N. W. Rep. 440 (Mich.).

In Michigan such a second verdict for murder is within the rule against double jeopardy. See *People v. Knapp*, 26 Mich. 112; 19 HARV. L. REV. 300. Therefore it is void unless it may be construed as a verdict for manslaughter. Since upon an indictment for murder manslaughter may be found, on the ground that the allegation of the greater crime includes the less, therefore a verdict for murder should amount to a finding of manslaughter when there can be no conviction for murder. A verdict naming the first degree of a crime has been held to be a finding of guilt in the second degree. *Simpson v. State*, 56 Ark. 8. The remaining difficulty of the length of the sentence might be remedied by holding the excess void under statute. MICH. COMP. L. § 11984; see *People*

v. *Town*, 53 Mich. 488. But since the sentence was given for the wrong crime, it is more just to remand the case to the lower court, that it may exercise its discretion in sentencing for manslaughter. Power so to remand after sentence illegal in length, terms, or procedure, is recognized by more modern authority. *McCormick v. State*, 99 N. W. Rep. 237 (Neb.); see 9 HARV. L. REV. 220. This doctrine seems equally applicable when the sentence is illegal upon another ground. Cf. *Simpson v. State*, *supra*.

CRIMINAL LAW — UNCLASSIFIED CRIMES — ATTEMPT FRAUDULENTLY TO SECURE PARDON. — A solicitor was convicted of larceny and disbarred. To secure his pardon and reinstatement he forged and sent to the authorities documents representing that he was innocent. The fraud was discovered before pardon was granted or a judicial inquiry begun. *Held*, that this attempt to pervert justice is a misdemeanor. *Rex v. White*, 6 S. R. (N. S. W.) 398.

A conspiracy to pervert justice would be indictable. See 1 HAWK. P. C., 8 ed., 444; *People v. Falck*, 125 N. Y. 324. But the defendant in the present case acted singly. His offense was an attempt to mislead a judicial inquiry and by improper means to have a proper conviction set aside. On the one hand this would be an interference with a tribunal administering public justice and on the other an interference with a judicial decision. Cases involving these offenses are rare, and text-writers mention them only incidentally. See 2 BISHOP, CRIM. LAW, 8 ed., §§ 86, 1029. But it has been held that an arbitration board sanctioned by courts of law is a tribunal administering public justice, and that an attempt to mislead it is a misdemeanor. *Regina v. Vreones*, [1891] 1 Q. B. 360. When clearly interfering with the administration of public justice, such offenses as the present should be misdemeanors at common law, for the state guards the administration of justice, and interference with state functions constitutes a misdemeanor. *Regina v. Bunting*, 7 Ont. 524; *Com. v. Silsbee*, 9 Mass. 416. As the completed act would be a misdemeanor, so also is the attempt. *Regina v. Chapman*, 2 C. & K. 846.

DAMAGES — CONSEQUENTIAL DAMAGES — LIABILITY FOR GRATUITOUS NURSING. — In an action to recover damages for personal injuries the plaintiff offered evidence of the value of his wife's nursing, although she could not recover against him for such services. *Held*, that the evidence is competent. *Indianapolis & E. Ry. Co. v. Bennett*, 79 N. E. Rep. 389 (Ind. App. Ct.).

It has been held that the value of services for which the plaintiff is not legally liable cannot be recovered. *Goodhart v. Pennsylvania Ry. Co.*, 177 Pa. St. 1. This result is based upon the theory that only the pecuniary loss may be recovered when damages are merely compensatory. See *Drinkwater v. Dinsmore*, 80 N. Y. 390. But on the contrary, where an injured party received gratuitous medical treatment as a member of the profession he was allowed to recover its value. *City of Indianapolis v. Gaston*, 58 Ind. 224. And it is well settled that the receipt of insurance cannot be proved to mitigate damages. *Harding v. Town of Townsend*, 43 Vt. 536. This last case is put on the ground that, as between the plaintiff and defendant, the insurance is *res inter alios acta*. See *Chicago, etc., Co. v. Pullman, etc., Co.*, 139 U. S. 79. Upon this ground the decisions next above cited as well as the present case seem correct. And the weight of authority is in accord. *Kaiser v. St. Louis Transit Co.*, 108 Mo. App. 708. The defendant is liable for the pecuniary equivalent of all injuries suffered, not merely for expenses actually incurred. The need of medical services is admitted to be a consequential damage for which the defendant should compensate the plaintiff, and a gift of such services by a third party cannot alter this liability.

DAMAGES — MEASURE OF DAMAGES — SUBJACENT SUPPORT OF HIGHWAY. — The defendants by removing minerals from beneath the surface caused a road and the land adjoining to sink a few feet. The defendants contended that their liability was limited to the cost of making an equally commodious road at the lower level. *Held*, that the defendants are liable for the reasonable cost of rebuilding the road to its former level. *Mayor, etc., of Wednesbury v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78.

In the case of a private way the right of the owner is to traverse the surface without having it obstructed. While a precipitous subsidence may well amount to an obstruction, a uniform subsidence in general would not. It is believed that the owner has his full rights so long as he is able, with no material increase in difficulty, to travel the line upon the surface which marks his way. His right should not extend to the maintenance of any particular level. A public road, however, is different. It is established by law in a certain place, and any interference with it which changes its level without lawful authority is *per se* a nuisance. *Milburn v. Fowler*, 27 Hun (N. Y.) 568; *Benfieldside Board v. Consett Iron Co.*, 3 Ex. D. 54. An abutting owner has been allowed to compel its restoration if it is unlawfully changed. *Finegan v. Eckerson*, 26 N. Y. Misc. 574. On the other hand he cannot complain of its restoration by those who lawfully control it. *Atherton v. Cheshire County Council*, 60 J. P. 6. Since, therefore, the public has a right to a particular level for the road, any one who displaces it should be liable for its restoration.

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY IN GENERAL — TWO INDEPENDENT CAUSES OF ACTION. — A statute gave personal representatives power to prosecute any personal actions their decedent might have prosecuted had he survived, except those for slander. Another statute gave certain surviving relatives the right of action for the death of their decedent occasioned through the wrongful act of others. Under the former statute damages were claimed by the administrator of the deceased, whose death had followed within a few hours after injury by the defendant. *Held*, that the plaintiff is not prevented from recovering because the relatives of the deceased have an independent cause of action for his death. *Stewart v. United Electric Light & Power Co.*, 65 Atl. Rep. 49 (Md.).

This case adopts the preferable view, which is supported by the weight of authority. For a discussion of the question see 15 HARV. L. REV. 854.

DISCOVERY — NATURE AND SCOPE OF PROCEEDING — BILL AGAINST ONE NOT PARTY TO RECORD. — The defendant in an action for freight brought a counterclaim for damage to the goods caused by the plaintiff's negligence. The defendant had been indemnified by the shipper for the loss and was advancing the counterclaim on behalf of the latter. The plaintiff asked for a discovery, in a matter concerning the counterclaim, from the shipper, a foreign company, as the real party in interest. *Held*, that the real party in interest make discovery or in default thereof all further proceedings on the counterclaim be stayed. *Compania Naviera Vascongada v. Hall*, 40 Ir. L. T. 246 (Ir., K. B., Nov. 8, 1906).

It is usually said that a discovery can be had only from a party to the record of the principal suit, and many English cases affirm this doctrine. *Fenton v. Hughes*, 7 Ves. 287; *Queen of Portugal v. Glyn*, 7 Cl. & F. 466. An early case, however, held that a real party in interest, though not on the record, might be subjected to a discovery. *Plummer v. May*, 1 Ves. 426. Its doctrine seems to be sanctioned by a later case, which the present one follows. *Willis v. Baddeley*, [1892] 2 Q. B. 324. However, in both the present decision and that which it purports to follow, the nominal plaintiff had no independent interest whatever; moreover, the relief in both cases took the indirect form of an injunction against the nominal plaintiff, conditional upon a discovery by the real plaintiff. The decision at hand goes further than the other in that there the nominal plaintiff was avowedly the mere agent of the real party in interest. In another late case, where the plaintiff on the record retained a one-fourth interest, though the conduct of the proceedings had been handed over to the party mainly interested, the bill against the latter was denied. *Nelson & Sons v. Nelson*, 95 L. T. R. 180 (Eng., C. A., June 12, 1906).

DOMICILE — HUSBAND AND WIFE — INDEPENDENT DOMICILE OF WIFE AFTER HUSBAND'S INSANITY. — The appellee instituted the present action to enjoin the prosecution of a claim for taxes. The appellee was a widow whose husband had been during the years for which the assessment was made an inmate of an insane asylum within the appellant's county. She and her husband had

been domiciled in the county prior to the husband's insanity, but subsequently thereto, but prior to the accrual of the tax in question, the appellee had established an actual and permanent residence in another jurisdiction. *Held*, that a wife is capable under these circumstances of establishing a separate domicile. *McKnight v. Dudley*, 148 Fed. Rep. 204 (C. C. A., Sixth Circ.).

The question involved, apparently a novel one, is decided in accordance with manifest justice. It is, moreover, supported indirectly by several lines of decisions. An insane person is incapable of changing his domicile. *McClerry v. Matson*, 2 Ind. 79. And it has been said that a husband's insanity should give the wife as complete rights as in case the husband were *civiliter mortuus*. See *Gustin v. Carpenter*, 51 Vt. 583. That desertion or cruelty will give the wife capacity to acquire an independent domicile for purposes of divorce is the doctrine of numerous decisions, and in a few cases the doctrine is applied for other purposes. *Watertown v. Greaves*, 112 Fed. Rep. 183 (C. C. A., First Circ.). In emphasizing, as a ground for its decision, the statutory enlargement of a wife's independent capacity, the court follows a somewhat anomalous doctrine advanced in New York and New Hampshire that the wife's emancipation from other disabilities relieves her also from dependence upon her husband's choice of domicile. *Matter of Florance*, 54 Hun (N. Y.) 328; *Shute v. Sargent*, 67 N. H. 305. Since in the present case the husband was no longer capable of choosing the matrimonial home, or of dominating the matrimonial status, there could be no better case for the application of the Supreme Court's dictum that "a wife may acquire a separate domicile whenever it is necessary or proper that she should do so." See *Cheever v. Wilson*, 9 Wall. (U. S.) 108, 124.

DOWER—RIGHTS OF WIDOW WHEN HUSBAND HAS SOLD LAND WITHOUT HER CONSENT.—The petitioner's husband during coverture sold part of his real estate without her consent. After his death she sought to have the value of her dower in the sold land set apart out of his remaining estate. *Held*, that the judgment sustaining the demurrer to the complaint be affirmed. *In re Park's Estate*, 87 Pac. Rep. 900 (Utah). See NOTES, p. 407.

EJECTMENT—DISSEISIN REQUISITE TO MAINTAIN ACTION—ENCROACHMENTS ABOVE SURFACE.—A telephone company without authority strung a wire over the plaintiff's land between posts neither of which touched the plaintiff's land. *Held*, that ejectment lies to compel the removal of the wire. *Butler v. The Frontier Telephone Co.*, 186 N. Y. 486.

For a discussion of this subject, suggested by the same case in the lower court, see 19 HARV. L. REV. 363.

EXECUTORS AND ADMINISTRATORS—PROCEEDINGS BY OR AGAINST—POWERS BEFORE ISSUE OF LETTERS.—In an action of replevin for seizing certain cattle claimed by the appellee, the appellant justified as the agent of the widow of the mortgagee of the cattle. The mortgage was due and unpaid. Letters of administration were granted to the widow after the commencement of this action. The court charged that if at the time when the property was taken there was no administration in the mortgagee's estate, the verdict should be for the plaintiff. *Held*, that the charge was correct. *James v. Nunley*, 97 S. W. Rep. 1028 (Ind. Ter.).

The appellant's principal when suit was begun was executrix *de son tort*. *Padget v. Priest*, 2 T. R. 97. Even had she not later received letters of administration, it is an open question whether she would have been liable here. And there is some authority to the effect that the appellant, being only an agent and apparently not intending to assume any of the ordinary duties of an executor, should not have been liable. *Givens v. Higgins*, 4 McCord (S. C.) 286. But the facts of this case afford a stronger reason for disagreeing with the decision. The seizure would admittedly have been valid if made by a *de jure* administratrix, which the widow later became. Thereupon her right related back to the death of the intestate, and with a few exceptions, here unimportant, her previous acts as executrix *de son tort* would be validated. See *McClure v. People*, 19 Ill. App. 105. The appellee should still be barred from

a recovery against her, although her appointment came after the suit was begun or judgment obtained. *Shillaber v. Wyman*, 15 Mass. 322; *Olmsted v. Clark*, 30 Conn. 108. Nor should her agent be liable if her act of seizure became validated. *Magner v. Ryan*, 19 Mo. 196.

FEDERAL COURTS — RELATION OF STATE AND FEDERAL COURTS — SUBSEQUENT JURISDICTION OF STATE COURT AFTER REMOVAL IN PRIOR ACTION. — The plaintiff discontinued an action which had been removed from a state court to a federal court on the petition of the defendant. Subsequently the plaintiff brought a new action for the same cause in a state court for an amount too small to permit removal to a federal court. *Held*, that the state court has jurisdiction. *Young v. Bell Tel. & Tel. Co.*, 75 S. C. 326.

It is necessary that the federal courts should have exclusive jurisdiction over a pending suit after its removal from the state courts in order to obviate the possibility of conflicting orders, decrees or judgment. This necessity, however, disappears when the action is dismissed, and consequently the jurisdiction of the federal court need not exclude subsequent actions in the state courts, though based on the same cause. This view has prevailed, and the present case is now settled law. *Gassman v. Jarvis*, 100 Fed. Rep. 146; *Texas, etc., Co. v. Starnes*, 128 Fed. Rep. 183; *aff.* 133 Fed. Rep. 1022. An objection to the decision, however, is that it permits the plaintiff to allow a dismissal in the federal court for the purpose of having the cause decided by a state court. See further 17 HARV. L. REV. 574.

FORGERY — CRIMINAL LIABILITY OF PARTNER FOR DEFRAUDING PARTNERS. — A partner was advanced a percentage on all advertising he secured for a program printed by the partnership. He was prosecuted for forgery for presenting spurious advertising contracts in order to receive his advance. *Held*, that he is not criminally liable. *State v. Pope*, 4 Oh. L. Rep. 532. (Oh., Hamilton Co. C. P., Nov., 1906).

The court argues that since a partner cannot be convicted of larceny or embezzlement of partnership property, by analogy he should not be criminally liable for obtaining partnership funds by forgery. The latter offense, however, does not involve the taking of another's property which is necessary in larceny or embezzlement. Forgery is defined as the false making or materially altering with intent to defraud of any writing which if genuine might apparently be of legal efficacy or the foundation of a legal liability. 2 BISHOP, CRIM. LAW, § 523. It might be argued that a partner can neither defraud nor have an intent to defraud the partnership, as that involves the idea of defrauding himself. Nevertheless it is recognized that he may be liable for defrauding his co-partners in a partnership transaction. *Patterson v. Hare*, 4 N. Y. App. Div. 319; *The Queen v. Warburton*, L. R. 1 C. C. 274. And so here the intent to defraud is found in the attempt to deprive the co-partners by deception of their interest in the partnership funds to be advanced on the contracts. Therefore the failure to convict seems an unnecessary miscarriage of justice. This conclusion is supported by authority. *Regina v. Smith*, 9 Cox C. C. 162; *Regina v. Moody*, 9 Cox C. C. 166; *contra, Com. v. Brown*, 10 Phila. (Pa.) 184.

GAMING — MECHANICAL DEVICES — CHANCE OF LOSS. — A saloon-keeper maintained on his premises a slot-machine, from which on every deposit of a nickel a check would issue of the face value of five cents or more. These checks were redeemable only in trade. The saloon-keeper arranged the checks in the machine and so knew their total amount. *Held*, that such a device constitutes gambling within the meaning of the Liquor Tax Law. *Matter of Cullinan*, 114 N. Y. App. Div. 654.

This case expressly overrules a previous New York decision holding that such a device is not gambling. *Cullinan v. Hosmer*, 100 N. Y. App. Div. 148. The fact that the customer cannot lose, which was the decisive point in the last-named case, is held to be immaterial. The cases cited to support the present decision are distinguishable. The statutes on which three of them rest

forbid the distribution of money by chance, whereas the Liquor Tax Law merely prohibits gambling on the premises. *Cf. Public Clearing House v. Coyne*, 194 U. S. 497; *Hudelson v. State*, 94 Ind. 426; *Lang v. Merwin*, 99 Me. 486. The New York case cited, where money prizes were distributed according to chance, was decided under a code section which provides for just such a transaction and is therefore not in point. *Cf. People ex rel. Ellison v. Savin*, 179 N. Y. 164; see N. Y. PENAL CODE § 323. The device in the principal case is clearly one of chance. It may well be doubted, however, whether it is a gambling device, for to constitute gambling there should be a mutual chance of loss and gain between the parties. This is the doctrine of numerous decisions. *Jordan v. Kent*, 44 How. Prac. (N. Y.) 206; *State v. Grimes*, 49 Minn. 443; see BOUVIER, LAW DICT.

INSANE PERSONS — CONVEYANCES — HOW AVOIDED. — In an action of ejectment the defendants claimed title under a deed from the plaintiffs' ancestor to a *bona fide* purchaser. The plaintiffs offered evidence to show that the grantor was insane when he made the deed. *Held*, that the evidence is inadmissible, as the deed must be regarded as valid until declared invalid by a court of equity. *Smith v. Ryan*, 36 N. Y. L. J. 1071 (N. Y., App. Div., Dec., 1906).

In jurisdictions which regard the deeds of insane persons as void, ejectment lies. *Farley v. Parker*, 6 Ore. 105. By the weight of authority, however, they are held merely voidable, analogously to the deeds of infants. See 17 HARV. L. REV. 575. But while an infant may avoid against a *bona fide* purchaser without a return of the consideration, this is generally not allowed an insane grantor. *Coburn v. Raymond*, 76 Conn. 484; *contra, Hovey v. Hobson*, 53 Me. 451. In the case of an infant an equitable action to avoid is not required. *Birch v. Linton*, 78 Va. 584. And the difference noted between the rules regarding infants and insane persons does not seem sufficient to make the aid of equity necessary here. It is true that in the case of the infant the bringing of the suit is a sufficient avoidance, while in the case of an insane person the mere act of disaffirmance is not always enough, as the repayment of the consideration may be an additional condition precedent to recovery. But if it can be shown that this condition has been fulfilled or that the plaintiff stands ready to pay the money into court, ejectment might well be allowed. *Eaton v. Eaton*, 37 N. J. L. 108.

INTERSTATE COMMERCE — CONTROL BY STATES — RAILWAY REPORTS TO STATE COMMISSION. — *Mandamus* was sought against a non-resident railway corporation doing business within the state, commanding it to report to the state railroad and warehouse commission a full and true statement of the affairs of the company, as required by the state act of 1871. The federal interstate commerce statute of 1887 requires a similar report to the Interstate Commerce Commission. *Held*, that as the state and federal laws are substantially identical and the requirement is not a burden on interstate commerce, the writ of *mandamus* be awarded. *People v. Chicago I. & L. Ry. Co.*, 79 N. E. Rep. 144 (Ill.).

The state demanded these reports for the purposes of the state railroad commission. The creation and functions of these commissions have been held repeatedly to be a valid exercise of police power. *N. Y. & N. E. R. R. Co. v. Bristol*, 151 U. S. 556, 571. As one of the functions of the commission is to recommend legislation affecting domestic commerce, it needs as a basis the reports of both intra-state and interstate railway corporations doing business within the state. In the absence of federal legislation the state could properly require these reports to be made even though affecting the acts of a carrier of interstate commerce. *Cooley v. Board of Wardens*, 12 How. (U. S.) 299. It might well be argued that the existence in the present case of similar federal legislation is immaterial, on the ground that the state requirement does not affect interstate commerce. *R. R. Co. v. Fuller*, 17 Wall. (U. S.) 560. But granting that there is an indirect effect, the existence of the federal statute in the present case does not invalidate the state statute, for the statutes are not conflicting. And

though they are similar, the purposes are different. The state statute consequently is not superseded. *Cf. Mo., etc., Ry. Co. v. Haber*, 169 U. S. 613.

INTERSTATE COMMERCE — CONTROL BY STATES — REQUIREMENT THAT BAGGAGE BE TRACED THROUGH CONNECTING CARRIERS. — A state statute provided that even though when shipping through freight over connecting lines a railway contracted for liability only on its own line, yet it should be liable for damage occurring anywhere unless it gave information as to the responsible person or proved that it could not with reasonable diligence do so. *Held*, that the statute is not an unconstitutional regulation of interstate commerce. *Skipper v. Seaboard Air Line Ry.*, 55 S. E. Rep. 454 (S. C.).

A state may forbid any limitation by contract of the common law liability of an interstate carrier for damage to freight. *Chicago, etc., Ry. Co. v. Solan*, 169 U. S. 133; see 11 HARV. L. REV. 544. But to enforce greater obligations to carry, so that an interstate carrier must be responsible for a through shipment over a connecting line, is a regulation of commerce held to be beyond the state's power. *Central of Ga. Ry. Co. v. Murphey*, 196 U. S. 194. Merely as a rule of evidence, however, a state law may provide that the taking of goods for such through shipment shall imply *prima facie* a contract of responsibility for the whole distance. *Mo., etc., Ry. Co. v. McCann*, 174 U. S. 580. But the first carrier cannot be put to the alternative of informing shippers as to those who caused any damage or of assuming, irrespective of its actual agreement, the responsibilities of a through contract. *Central of Ga. Ry. Co. v. Murphey*, *supra*. True, in the present case the responsibility may be avoided by showing due diligence in seeking the information. Even so the statute does not seem so reasonable a local measure that, as in the case of the rule of evidence, the subject involved should be open to state control rather than be maintained *in statu quo* until Congress shall act.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — DUMPOR'S CASE. — The plaintiffs conveyed land to a railroad company on condition that if the land ceased to be used for railroad purposes it should revert to the grantors. A grantee of the railroad mortgaged the land to the defendant, without the plaintiffs' knowledge, and later gave a second mortgage deed of the same land, on which the plaintiffs endorsed that, to the extent of such mortgage, they waived "any right of reversion under the condition" in the original deed. *Held*, that the waiver of the condition as to the second mortgage does not determine the condition as to the first mortgage. *Moss v. Chappell*, 54 S. E. Rep. 968 (Ga.).

Although this decision is sound, the court seems to have erred in assuming the case to be within the rule in *Dumpor's Case*, in which it was held that, in case of a lease, the waiver of a condition not to assign, given in favour of the original lessee, operated as a complete destruction of the condition. *Dumpor's Case*, 4 Coke 119*b*; see 12 HARV. L. REV. 272. This doctrine has been much limited. It has been restricted entirely to conditions against assignments of leases, even to the exclusion of sub-leases. *Doe v. Bliss*, 4 Taunt. 735. This alone is sufficient to remove the present case from its operation. But there is still another objection to its application. The decision in *Dumpor's Case* that a waiver given as to one breach operates as a waiver of all breaches by no means, it is believed, involves the doctrine that a waiver of all breaches for a specific purpose, such as in the present case the protection of a certain mortgagee, destroys the condition as to all purposes. The effect of the waiver in the present case was merely to make the plaintiff's potential right of entry part of the security in the second mortgage. That clearly does not make it security for the first mortgagee.

LIMITATION OF ACTIONS — NATURE AND CONSTRUCTION OF STATUTE — WHAT CONSTITUTES WRITTEN CONTRACT. — The plaintiff made an offer in writing to a bilateral contract which the defendant, it seems, accepted orally. The Statute of Limitations barred actions on written contracts after ten years; on oral contracts after five years. *Held*, that the plaintiff's right of action is not barred until after ten years. *Bauer v. Hindley*, 222 Ill. 319.

To constitute a written contract the parties and terms must be distinctly specified in writing. *Grafton v. Cummings*, 99 U. S. 100. But where a written contract is required by the Statute of Limitations, it is not essential that the writing be signed by all the parties or even by the party to be charged. *Memory v. Niepert*, 131 Ill. 623; *Midland Co. v. Fisher*, 125 Ind. 19. It must, however, purport to be the statement of a completed contract; a recital of the terms in a writing not intended as the expression of the agreement is insufficient. *Wood v. Williams*, 142 Ill. 269. An offer in writing contemplating acceptance by counter-promise obviously neither states nor purports to state the terms of a completed contract, and in the absence of further writing, an agreement based thereon is not a written contract. *Board of Education v. Foley*, 88 Ill. App. 470; *Hulbert v. Atherton*, 59 Ia. 91. But in case the offer contemplates a unilateral contract, no further writing is required to constitute a written contract. *Plumb v. Campbell*, 129 Ill. 101. The probable explanation of this distinction, apparently disregarded in the present case, is that no other promise than that contained in the offer is necessary to complete a unilateral contract, and hence the offer is the only essential element in the transaction that can be put in writing.

LIMITATION OF ACTIONS — NEW PROMISE AND PART PAYMENT — EFFECT ON BARRED JUDGMENT. — After the Statute of Limitations had run on a judgment, the judgment debtor gave the assignee of the judgment a mortgage to secure its payment containing a written promise to pay. *Held*, that the judgment is enforceable. *Spilde v. Johnson*, 109 N. W. Rep. 1023 (Ia.).

After the Statute of Limitations had run on a judgment, the judgment debtor made part payment. In an action on the judgment the debtor pleaded the Statute of Limitations. *Held*, that the action on the judgment is barred. *Olson v. Dahl*, 109 N. W. Rep. 1001 (Minn.).

The rule that acknowledgment or part payment revives an action on which the Statute of Limitations has run is by general consent, for some reason not clear, applied only in the case of contracts. See *WOOD, LIMITATIONS*, § 66. Whether a judgment is a contract is the subject of much difference of opinion. Text-writers in classifying contracts are accustomed to speak of judgments as contracts of record. See *1 STORY, CONTRACTS*, 2. And a judgment has been held to be an implied contract within the meaning of a statute. *Gutta Percha Co. v. Mayor*, 108 N. Y. 276. It is not, however, a true contract; at most it is an obligation "implied in law," — the so-called quasi-contract. And it is generally held that the term "contract" includes only obligations based on the consent of the parties, and not those that are quasi-contractual. *State of Louisiana v. New Orleans*, 109 U. S. 285. Accordingly a judgment as such is not given the protection of the constitutional inhibition against the impairment of contractual obligations by the states, such protection being granted only to judgments based on contracts. *Nelson v. St. Martin's Parish*, 111 U. S. 716. The weight of divided authority, in agreement with the Minnesota case under consideration, favors the suggested conclusion that a judgment should not be considered a contract. *McAleer v. Clay County*, 38 Fed. Rep. 707; *contra*, *Frisbie v. Seaman*, 49 Ia. 95; see *1 BLACK, JUDGMENTS*, §§ 7, 8, 10.

MUNICIPAL CORPORATIONS — CONTRACTS — PATENTED ARTICLES. — A statute required that certain contracts for public improvements be let to the lowest responsible bidder. An ordinance prescribed the use of a certain patented commodity in the construction of a municipal improvement. The patentee had agreed to furnish the commodity at a stipulated price to the contractor whose bid should be accepted. *Held*, that the ordinance is void as in violation of the statute. *Siegel v. City of Chicago*, 79 N. E. Rep. 280 (Ill.).

For a discussion of the principles involved, see 19 HARV. L. REV. 138.

QUIETING TITLE — REMOVAL OF CLOUD FROM PERSONAL PROPERTY. — The defendant made verbal claims to personal property possessed and owned by the plaintiff, whereby its market value was greatly diminished. *Held*, that a bill to remove cloud on title does not lie. *Red, etc., Co. v. Steideman*, 97 S. W. Rep. 220 (Mo., St. Louis Ct. App.).

This decision seems undoubtedly correct; for as verbal claims have almost uniformly been held to raise no cloud on realty, no more should they have that effect on personality. See *Parker v. Shannon*, 121 Ill. 452; but see *Moran & Co. v. Palmer*, 36 Wash. 684. Moreover, the rule, supported by the weight of opinion (mostly dicta), that a bill to quiet the title of personal property never lies, has previously appeared to prevail in Missouri. See *State ex rel. Kenamore v. Wood*, 155 Mo. 425, 446. In the present case, however, a dictum recognizes "exceptions to this rule" which, unless wholly unreasoned and anomalous, seem to lead towards the opposite view that such a bill would lie in the case of personality under the same circumstances as in the case of realty. See *Stebbins v. Perry County*, 167 Ill. 567. The issue between these two doctrines is simply one of policy. For the one, argument may be made that in the eye of the common law personality has always been of less importance than realty; that usually adverse claims do not so much impair the value of personality as of realty; and that this somewhat extraordinary remedy might be invoked in too many petty controversies. Supporting the other are the considerations that the elimination of verbal claims largely nullifies the force of the above suggestions; and that if equity does not provide this remedy, a situation often causing substantial injury will be without relief.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — LICENSE CONTRACTS UNDER PATENTS. — In order to control the market, various threshing-machine manufacturers had transferred their patent rights to the complainant, who acquired in this or other ways practically all patents affecting one branch of the business. The complainant then entered into uniform contracts with all the manufacturers, licensing them to use these patents, and stipulating among other things that they should maintain a uniform price for the completed machines. The complainant sought to enforce one of these contracts against the defendant manufacturer, who had cut prices. *Held*, that the contract is in restraint of trade and in violation of the Anti-Trust Act of July 2, 1890. *Indiana Mfg. Co. v. J. I. Case Threshing Machine Co.*, 148 Fed. Rep. 21 (Circ. Ct., E. D. Wis.).

For a discussion of the principles involved, see 19 HARV. L. REV. 125.

SALES — FACTORS' ACT — LARCENY BY AGENT. — A broker falsely represented to the plaintiff that he had certain named prospective customers. The plaintiff thereupon gave him possession of the goods with power to sell them to either of the proposed customers. The broker sold the goods to the defendant, a purchaser without notice. The jury found that the broker had committed larceny by trick. *Held*, that, under the Factors' Act of 1889, the defendant got good title. *Oppenheimer v. Frazer & Wyatt*, 51 Sol. J. 131 (Eng., K. B. D., Dec. 15, 1906).

The Factors' Act provides that where a mercantile agent is, with the consent of the owner, in possession of goods, a sale to a *bona fide* purchaser shall be valid. 52 & 53 VICT., c. 45, § 2. That the seller secured possession by fraud would not impair the validity of the purchaser's title, provided the owner gave him possession as a "mercantile agent," or, in the language of the earlier statutes, provided he was an "agent intrusted." *Baines v. Swainson*, 4 B. & S. 270. But if one obtains mere possession without being intrusted as mercantile agent, he can convey no title by virtue of the Factors' Act. *Kingsford v. Merry*, 1 H. & N. 503. There are dicta that if there is fraud amounting to larceny by trick no title can pass. See *Cahn v. Pockett's Co.*, [1899] 1 Q. B. 643, 659. But these dicta are inaccurate, for it is not because of fraud and larceny that the Act may not apply, but because there may be no intrusting as agent. *Cf. Cole v. N. W. Bank*, L. R. 10 C. P. 354, 373. And in the present case, although the agent committed larceny, he was empowered to sell, and this, though to a limited class, constituted an intrusting according to the accepted meaning of the term. *Baines v. Swainson*, *supra*; see *Phillips v. Huth*, 6 M. & W. 572, 598.

TAXATION — PARTICULAR FORMS OF TAXATION — NEW YORK STOCK TRANSFER TAX. — A New York statute imposed on all sales of stock in domestic

or foreign corporations a tax of two cents "on each one hundred dollars of face value or fraction thereof." A Connecticut vendor sold in New York to a Connecticut vendee shares in two foreign corporations without paying the tax. He was arrested and brought *habeas corpus*. *Held*, that the writ be dismissed, as the tax is constitutional. *People ex rel. Hatch v. Reardon*, U. S. Sup. Ct., Jan. 7, 1907.

For a discussion of this case in a lower court, see 19 HARV. L. REV. 460.

TAXATION — PARTICULAR FORMS OF TAXATION — SUCCESSION TAX ON NON-RESIDENTS' LIFE INSURANCE POLICIES. — A New York statute imposed a succession tax of five per cent on all "property within the state" belonging to a non-resident decedent. A New York corporation issued to a resident of New Jersey a life insurance policy which was always kept in that state. A New Jersey statute required the corporation, as a condition precedent to doing business in that state, to accept service of process on a state official. At the decedent's death the corporation had assets in New Jersey sufficient to satisfy his claim. *Held*, that the policy is not subject to the New York tax. *Matter of Gordon*, 186 N. Y. 471.

Courts are slow to extend general property taxes to life insurance policies because of practical difficulties of computation. *State Board v. Holliday*, 150 Ind. 216. This objection obviously does not apply to inheritance taxes; residents' policies are subject to such taxes as creditors' assets. *Matter of Knoedler*, 68 Hun 150; aff. 140 N. Y. 377. New York courts originally recognized a lack of jurisdiction to tax non-residents' policies, wherever deposited. *Matter of Horn*, 39 N. Y. Misc. 133. Whether they have adopted recent federal dicta, allowing the taxation of debts at the debtor's domicile, is yet uncertain. See *Blackstone v. Miller*, 188 U. S. 189; 20 HARV. L. REV. 313. A dissenting judge below argues forcefully that they have. See *Matter of Gordon*, 114 N. Y. App. Div. 202. But in the principal case the court points out that the reasoning of the federal dicta does not apply, for the creditor need no longer seek aid from the debtor's state to collect his claim in view of the New Jersey statute. The court is so obviously indisposed to jeopardize the mammoth insurance business of New York that it is idle to speculate on the result in the absence of such legislation. Nor does it intimate what it shall do as to other choses in action, similarly situated, such as annuities or letters of credit. The state regulation of foreign corporations relied on is not peculiar to insurance companies. See BEALE, FOR. CORP., §§ 117, 141-196.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE ASSIGNABILITY OF CONTRACT. — An assignment of a contract is in fact a power of attorney,¹ or the creation of an agency, so that in general any contract that may be performed through an agent and does not in its terms contemplate personal performance may be assigned. Assignments, valid and invalid, may be divided into three broad classes: (a) an assignment of a chose in action; (b) a power of attorney to perform and to receive performance; (c) an assignment of rights coupled with a delegation of duties.² Assignments under class (a) are generally valid, and the consent or even objection of the debtor is immaterial. For performance to the agent gives a discharge of the debt, and the assignee, being a mere agent, is subject to all the equities good against the assignor,³ provided the chose in action has not the further quality

¹ See 3 HARV. L. REV. 337, 340.

² Cf. 18 HARV. L. REV. 23.

³ Wald's Pollock, Contracts, 3 ed., 222.

of negotiability. In this class may be included by analogy the assignment of rights to be acquired under an existing executory contract.¹ An important exception to class (a) is the ordinary contract of agency or service where personal control over performance is a right of the creditor, for the debtor should not be obliged to submit to the control of a third party. For the same reasons class (b) is generally unobjectionable; a power of attorney does not relieve the principal of any liability, but on the contrary he remains as a surety, and if the agent fails to perform, or if performance is unsatisfactory, the creditor may sue the assignor directly.² Therefore, if the assignment purports to be a creation of an agency and the act is one which may be performed through an agent, and if no stipulation to the contrary, express or implied, can be found in the contract, the assignee has the legal right to have his performance accepted and paid for at the contract price. The real difficulty is found in class (c). It is a familiar principle of agency that an agent may be appointed to pay as well as to collect a debt,³ but not to owe a debt; *i. e.*, a new debtor cannot be substituted without the assent of the creditor. It follows that an attempt to delegate a duty is void.⁴ Moreover, if the attempted assignment includes a renunciation of further liability on the part of the assignor, whether express or necessarily implied, the assignor must be considered to have repudiated his contract and the other party may either rescind or sue for the breach.⁵ Ignorance of the assignment cannot prevent the accrual of this right, and on notice any time thereafter the implied offer to a novation may be refused and action brought.

In a much discussed Massachusetts case⁶ the defendant, who had bought ice from the plaintiff, became dissatisfied and contracted for ice with the Citizens' Ice Co. Subsequently the plaintiff bought out the business of the Citizens' Co. and delivered ice to the defendant without notifying him of the change until after the delivery and consumption of the ice. The court held that the contract could not be assigned, on the ground that "a man has the right to determine with whom he shall contract"; and that further no quasi-contractual liability was incurred since the plaintiff was inexcusably officious. In a recent article Mr. George P. Costigan, Jr., clearly points out the fundamental difference between selecting a contractor and refusing an assignee of a contract already formed, and concludes that the plaintiff had a right to sue as assignee on the ground that the case falls within class (b) above. *The Doctrine of Boston Ice Co. v. Potter*, 7 Colum. L. Rev. 32 (January, 1907). It is submitted, however, that the Citizens' Co. by selling out its business manifested an intention to escape further liability, even as surety, — *i. e.*, was attempting a novation, — and that therefore the rules of class (c) should apply. It follows that the court was correct in saying that the defendant could have refused to deal with the plaintiff had notice been given.

The further question of recovery on a *quantum meruit* still remains. Mr. Costigan criticises the court's argument on the ground that even if the plaintiff had no legal rights under the contract, he *bona fide* supposed himself to be the assignee and so should not come within the strict Massachusetts rule that recovery is refused in spite of the enrichment of the defendant if the plaintiff was inexcusably officious. It is believed, however, that the plaintiff's mistake was not one of fact but of law, — whether a valid assignment had been made. The knowledge that the defendant did not want to deal with him is a sufficient answer to the plaintiff's claim of *bona fides*:⁷ he knew or should have known that on notice the defendant would exercise his rights and rescind. The action was in fact brought on an implied *assumpsit*, and Mr. Costigan agrees that

¹ *Darling v. Andrews*, 9 Allen (Mass.) 106; see 4 Cyc. 17.

² See 2 Am. & Eng. Encyc. 1036.

³ See Huffcut, Agency, 5.

⁴ See Wald's Pollock, Contracts, 3 ed., 295, n. 91.

⁵ *Cf. Arkansas Smelting Co. v. Belden Mining Co.*, 127 U. S. 379. But see *Tolhurst v. Portland Cement Mfrs.*, [1903] A. C. 414.

⁶ *Boston Ice Co. v. Potter*, 123 Mass. 28.

⁷ See Keener, Quasi-Contracts, 360. *Cf. Boulton v. Jones*, 2 H. & N. 564.

recovery was properly refused, but on the ground that a quasi-contractual right is essentially equitable, and so should not be allowed when there is an adequate remedy on the express contract. This conclusion may be sound,¹ but on the view here advanced is inapplicable to the case, since the assignee had no rights under the express contract.²

SELF-INTEREST AS THE BASIS FOR THE DEVELOPMENT OF THE LAW. — The law's development has been a fertile field of discussion since jurisprudence has been the subject of study and investigation. Whether custom becomes law when recognized by the courts or is binding law before such recognition, it is an acknowledged source of law. Economic changes in the conditions of the times exercise a potent influence on customs and necessarily call forth changes in the law either by direct or by judicial legislation. The forces which accomplish such alterations are discussed in an interesting contribution to recent periodical literature. *The Modern Conception of Animus*, by Brooks Adams, 19 Green Bag 12 (January, 1907).

The writer takes the position that law is not a science in itself, but expresses a resultant of social forces. He maintains that the law is molded by the dominant class exercising its powers for its own self-interest. It is the animus of the actor, he contends, which controls human actions and therefore limits legal responsibility. Consequently, since rules of evidence and definitions control the proof of animus, the dominant class accomplishes its purpose by shaping the rules of evidence. Abstract principles of justice have had little to do with the development of legal principles or procedure. To illustrate, the writer divides the treatment of crime into four periods. First, the period after the Norman invasion exemplifies the influence of the warlike class. Crimes of violence could be proved only by an eyewitness, and the accused could clear himself by combat or the ordeal. Then, for the better suppression of heresy, the church abolished the ordeal, and the jury trial arose. During this period the upper class had the benefit of clergy, besides great influence over the individual jurymen, to protect it. The next period showed the disappearance of castles and body-guards. As a result, a severe criminal code was made to protect the land-owners from marauders. Lastly, this severity was relaxed when the extension of the police system afforded sufficient protection in itself.

The writer has made out a plausible case against the dominant class. While warfare was constant and the state too decentralized to afford any protection, the fighting class held the upper hand and its might was right. But the last period, when punishment of crime became less severe, hardly supports his position. The extreme stand taken violates most modern ideas of the law. Its ultimate object has been expressed as the highest well-being of society.³ It is the effort of a people to express its idea of right, although that idea may be constantly changing.⁴ Surely, unless justice is made a mere hypocritical conception of the dominant class to blind itself and others to its real motives, the writer's view cannot be upheld.

AFFIDAVITS IN ATTACHMENT. II. *Raymond D. Thurber*. 7 Bench & Bar 92.

BRUNSWICK SUCCESSION, THE. *Gordon E. Sherman*. Dealing with the importance of primary treaties between the states of the German Empire in German constitutional law. 16 Yale L. J. 176.

CAPITAL AND CAPITAL STOCK. *Frederick Dwight*. A review of the authorities on the exact meaning of the words as used in statutes. 16 Yale L. J. 161.

¹ But see Gilbert, etc., *Co. v. Butler*, 146 Mass. 82.

² If Mr. Costigan's contention that the plaintiff had rights under the contract is correct, then the defendant's deliberate refusal to pay would be a repudiation of the contract and the plaintiff could sue in *indebitatus assumpsit* for restitution of value, since repudiation amounts to abandonment. See 7 Colum. L. Rev. 47. Cf. Keener, *Quasi-Contracts*, 303.

³ Holland, *Jurisp.*, 10 ed., 77.

⁴ See 18 HARV. L. REV. 272.

- CODE NAPOLEON, HOW IT WAS MADE AND ITS PLACE IN THE WORLD'S JURISPRUDENCE. *U. M. Rose*. 40 Am. L. Rev. 833.
- CONSTITUTIONALITY OF THE JUVENILE COURT LAWS OF ILLINOIS. *Anon.* Discussing adversely a decision that commitment under the laws violates the father's constitutional right to the child's services. 133 Nat. Corp. Rep. 468. See 19 HARV. L. REV. 374.
- CONTRACTS OF INDEMNITY. *T. F. Martin*. Discussing under the English decisions their effect in the covenants given by purchasers of leaseholds or of lands subject to restrictive covenants. 4 Commonwealth L. Rev. 13.
- DOCTRINE OF BOSTON ICE COMPANY *v.* POTTER, THE. *George P. Costigan, Jr.* 7 Colum. L. Rev. 32. See *supra*.
- EVOLUTION OF THE LAW BY JUDICIAL DECISION. II. *Robert G. Street*. 14 Am. Lawyer 554.
- INTERNATIONAL COLLECTIONS. *W. L. Penfield*. 39 Chi. Leg. News 165.
- INTERNATIONAL CONFERENCE AT RIO DE JANEIRO. *Hannis Taylor*. Discussing particularly the making of treaties which shall force submission to arbitration for all claims of a pecuniary nature held by people of one nation against another. 40 Am. L. Rev. 896.
- MEDIAEVAL CAUSE CELEBRE, A. *John M. Zane*. A detailed description of a thirteenth century trial at Westminster based on Bracton's Note Book, the case involving the mediæval notion of adoptions, and the legal fiction by which the judges permitted it. 1 Ill. L. Rev. 363.
- MODERN CONCEPTION OF ANIMUS, THE. *Brooks Adams*. 19 Green Bag 12. See *supra*.
- NON-FEDERAL LAW ADMINISTERED IN FEDERAL COURTS, THE. *Wm. Trickett*. 40 Am. L. Rev. 819. See 18 HARV. L. REV. 134.
- POWER OF MUNICIPAL CORPORATIONS TO MAKE SPECIAL ASSESSMENTS FOR LOCAL IMPROVEMENTS, THE. *Edson B. Valentine*. 68 Alb. L. J. 325.
- PRIORITIES OF DEBENTURES AND GARNISHED DEBTS, THE. *Anon.* 51 Sol. J. 110.
- PRIVILEGE OF SILENCE AND IMMUNITY STATUTES, THE. *Franklin A. Beecher*. 40 Am. L. Rev. 869, 64 Cent. L. J. 3. See 20 HARV. L. REV. 61.
- QUESTIONS IN THE LAW OF FRAUDULENT ALIENATIONS, SOME. *Anon.* Tracing through the English cases the change in legal meaning undergone by the words "intent to delay, hinder or defraud," and the substitution of external tests of fraud for internal. 16 Madras L. J. 383.
- REFORMS IN THE LAW OF FUTURE INTERESTS NEEDED IN ILLINOIS. II. *Albert Martin Kales*. 1 Ill. L. Rev. 374.
- RESCISSION OF EXECUTED CONTRACTS OF SALE FOR BREACH OF WARRANTY. *George A. Lee*. 10 L. N. (Northport) 188. See 16 HARV. L. REV. 465.
- SEGREGATION OF JAPANESE STUDENTS BY THE SCHOOL AUTHORITIES OF SAN FRANCISCO. *Charles Cheney Hyde*. Discussing the question from a legal and from a political viewpoint. 19 Green Bag 38. See 20 HARV. L. REV. 337.
- SUGGESTIONS CONCERNING THE LAW OF FIXTURES, SOME. *Joseph W. Bingham*. Attempting to lay down the principles underlying the law of fixtures, and to demonstrate that they form a consistent and easily comprehensible body of rules. 7 Colum. L. Rev. 1.
- TITLES TO COAL LAND IN PENNSYLVANIA AND INCIDENTAL MONOPOLIES CONNECTED THEREWITH. *Alfred Hand*. Maintaining that the way to prevent injustice arising from such monopoly is through the exercise of the power vested in the government to control railway rates. 16 Yale L. J. 167.
- UNSOUNDNESS OF MIND IN RELATION TO TORTS. *H. Dean Bamford*. Contending, contrary to American decisions, that total insanity should excuse a defendant from liability for his torts. 4 Commonwealth L. Rev. 3.

II. BOOK REVIEWS.

COURTS AND PROCEDURE IN ENGLAND AND IN NEW JERSEY. By Charles H. Hartshorne. Newark, N. J.: Toney & Sage. 1905. pp. xi, 233. 12mo.

The articles contained in this book were published in the *New Jersey Law Journal* during the discussion of proposed amendments to the constitution making a slight change in the judicial system of the state. Mr. Hartshorne's

object was to defeat the proposed plan with the purpose of bringing about a much more radical change, and most of these articles were published for the purpose of showing that the existing system was antiquated, intricate, and inefficient, and also that there were in other states and in England systems that were more simple, more direct, and better adapted to the administration of justice under modern conditions. It is the plans adopted in England, Massachusetts, and Connecticut that are chiefly used as examples for the reform which he insisted should be made in New Jersey.

The courts of New Jersey retain the names and the functions of the old English courts from which they were derived. Equity jurisdiction remains in the Court of Chancery, and common law rights are enforced by several different courts of law. Mr. Hartshorne insists upon the unification of the courts and on doing away with the exclusive division of jurisdiction between district courts, and gives many illustrations from New Jersey cases of delay and failure of justice because a suit begun in one court should have been brought in another or could not be fully determined without resort to another. He makes a tabular comparison of several different judicial systems and gives a clear account of the English courts and their procedure.

To lawyers of New Jersey, familiar with the practical working of their systems, the difficulties stated so earnestly by Mr. Hartshorne appear to be overestimated and his objections theoretical rather than practical. If there are many courts with many ancient names, it is only because the judges in exercising various kinds of jurisdiction are called by the names of the old English courts by which these different jurisdictions were exercised. The bar of New Jersey is not unobservant of the changes that have been made in other states and in England in having one form of procedure and one court for law and equity, but the great majority of its members are firmly convinced by observation of other systems and experience with their own, that both law and equity, so long as the two systems exist with different principles and different remedies, are more safely and more exactly administered by different modes of procedure and by judges specially trained and experienced in the different systems. They do not think it prudent to give the great powers of the chancellor to every county judge. They think it best that counsel should understand the distinction between legal and equitable principles and remedies, and should be careful to know what his rights and remedies are before he brings his suit, and they believe that in practice there is little more delay because of going into the wrong court than because of mistakes in the choice of the remedy.

The proposed amendment to the constitution which Mr. Hartshorne criticised was defeated at the polls, and a new plan has now been suggested by a commission appointed by the governor. The new plan retains the systems of law and equity with separate modes of procedure and trial as heretofore, but it does unify the courts by making one supreme court with several divisions and it does make provision for the transfer of cases from one division to another. By this means it removes the defect in the present system which was the subject of Mr. Hartshorne's most vigorous criticism.

E. Q. K.

A MANUAL OF THE PRINCIPLES OF EQUITY. By John Indermaur. Sixth Edition. London: Geo. Barber. 1906. pp. xxxii, 597.

This manual is divided into three parts. The first tells about the origin of the Court of Chancery and its substitute effected by the Judicature Act of 1873. In an intervening chapter, twelve "maxims" of equity are stated and briefly illustrated. Part two deals with matters specially assigned by the Judicature Act to the Chancery Division of the High Court, and forms the bulk of the book. The third part devotes about one hundred and fifty pages to some doctrines which originated in equity and are still classed under its jurisdiction, though not covered specially by the statute of 1873. In an appendix, five important English statutes are printed. The book contains, further, a short preface by the editor of this edition, Charles Thwaites; a table of contents; an index of

cases, of statutes, and of the edition of text-books to which any reference is made, and also a full, workable general index.

The book now appears in its sixth edition, — during a life of only twenty years. The present issue differs materially from the fifth only in considerable alterations in three chapters, as also in the insertion of numerous cases and certain statutory changes of the last four years.

Although the author says distinctly that the essence of equity lies in the relief it gives, yet it may be doubted whether the beginner would realize that fact where theory is so briefly handled and so much subordinated to a statement of the English statutory fusion of law and equity in late years. The great merit of the work remains in its excellence as a book of quick reference for the English practitioner. Its use in America might well be considerable to students of civil government, in that here one branch of the present English court structure is admirably treated.

W. S. McN.

THE POWER TO REGULATE CORPORATIONS AND COMMERCE: A Discussion of the Existence, Basis, Nature, and Scope of the Common Law of the United States. By Frank Hendrick. New York and London: G. P. Putnam's Sons. 1906. pp. lxxii, 516. 8vo.

One is tempted to say more against this book than it deserves; for the author's method is exasperating indeed. His line of thought is so obscure in itself, and it is so obstructed by extraneous learning which seems to have no relation to the conclusion, that the reader loses his patience in every section.

As nearly as the reviewer can apprehend the meaning of the author (and he must confess that in spite of an epitome of the argument in the preface he would not be surprised to learn that the author means the exact opposite), he argues that corporations are created and allowed to engage in commerce by the common law, without the help of legislation; that the only common law is a law common to the whole United States, and not restricted to any state; that the United States courts have common law jurisdiction to enforce the provisions of this law in the case of all corporations, and that no legislation is required for the regulation by the United States of public service corporations engaged in interstate commerce.

Each one of these assertions is absolutely contrary to law, as every lawyer knows; and a lengthy review of the work or a pointing out of the numerous lesser errors and inconsistencies would be ungracious and useless. The author has gathered a mass of information and has cited many authorities, which he does not use in a very lawyer-like way. The book will be found useful for its collection of authorities, and as a picture of the legal condition of our country if centralization had its perfect work and there were one law extending over the whole United States.

J. H. B.

SUPPLEMENT TO SNYDER'S INTERSTATE COMMERCE ACT AND FEDERAL ANTI-TRUST LAWS, embracing the Railway Rate Bill approved June 29, 1906, amending the Commerce Act and Elkins Act; with an introduction and full notes of judicial decisions rendered since the publication of the work in July, 1904; with a reference to the anti-trust laws of the several states. Including also the Employers' Liability Bill, Pure Food Bill, Meat Inspection Bill, and Hall-Mark or Jewellers' Liability Bill. Containing also an index and table of cases. By William L. Snyder. New York: Baker, Voorhis & Company, 1906. pp. xl, 178. 8vo.

This is a supplement to the work by Mr. Snyder which was reviewed in 18 HARVARD LAW REVIEW 241. It is valuable, like the earlier book, chiefly as a convenient collection of late statutes and decisions bearing upon a most interesting, important, and rapidly developing branch of the law. The reviewer has found the original work useful in dealing with questions of interstate commerce, and the supplement seems a necessary addition in view of the recent legislation upon the subject.

H. LE B. S.

HARVARD LAW REVIEW.

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CRUCIAL ISSUES IN LABOR LITIGATION.

III.

HAVING stated¹ general propositions as to the requisites for justification, it is now proposed to apply these tests to some hypothetical cases. But it should be premised that the views now to be expressed must to some extent represent simply the ideas of the individual writer rather than a consensus of judicial opinion. Some cases, which might well have turned on the question of justification, have gone off on other issues; and hence there has been less discussion of justification than might have been expected.² In the scarcity of direct authority as to some situations, one cannot feel sure that each of the particular problems has been correctly solved. It may, however, be possible to indicate the lines on which these problems must be worked out.³

¹ *Ante*, p. 361.

² As to possible justification, or necessity to justify, in case of an employer's threat to discharge his employees if they trade with plaintiff, see 18 HARV. L. REV. 417, 418; and *cf.* 44 Am. L. Reg. (N. S.) 481-484.

³ These hypothetical cases are, of course, discussed on the assumption that the general views previously stated as to *primâ facie* liability are correct, although we do not stop in each case to point out exactly how these views specially apply to that particular case.

Some readers who believe that the defendant should be exonerated in various hypothetical cases where we think him liable, may base their conclusion on the ground that the defendant's conduct needs no justification. Disagreeing with the views previously expressed in this article as to *primâ facie* liability, they think that in certain cases there is no call upon the defendant to justify his conduct. In some of these instances, if they had thought that the defendant's conduct was *primâ facie* actionable, they might possibly have held the attempted justification insufficient.

Case 1. A has only one vacancy among his employees. B applies for the place. Immediately after, defendant applies for it and obtains it. Defendant knew that his application, if successful, would prevent B's obtaining employment from A. B sues defendant.

Here defendant is justified. He has an equal right with B to be a candidate for the single place.¹ The question whether defendant's justification would be destroyed by proof that his predominant motive was ill will to B is one seldom likely to arise. For reasons elsewhere given, we think that such bad motive would not rebut the otherwise sufficient justification.

Case 2. B is working for A under a contract terminable, at any moment, at the will of either party. Defendant, who is working for A under a similar contract, tells A that he will quit A's employ unless A ceases to further employ B. A thereupon ceases to employ B. A has room for both B and defendant in his business. Defendant's sole reason for the notice is his personal dislike of B. He has no objection to B's character or habits. B sues defendant.²

We think that the desire of gratifying defendant's capricious dislike of B does not justify thus intentionally inducing A to take action damaging to B. It is true that Lord Watson, in *Allen v. Flood*,³ said: "It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree or continue to work." But it is submitted that while the right to simply abstain from work may be "absolute," yet this "right" (or a threat to exercise it) cannot be used affirmatively as a lever to induce a third person to take action damaging to the plaintiff. "No one can legally interfere with the employment of another, unless in the exercise of some right of his own which the law respects. His will so to interfere for his own gratification is not such a right."⁴

Case 3. B, a non-union journeyman printer, is working in A's printing office under a contract terminable, at any moment, at the will of either party. Defendant, a union journeyman printer who is working for A under a similar contract, tells A that he will quit A's employ unless A ceases to further

¹ See Knowlton, C. J., in *Berry v. Donovan*, 188 Mass. 353, 357; Loring, J., in *Pickett v. Walsh*, 78 N. E. Rep. 753 (Mass.).

² The question would be the same in principle if defendant had offered to begin working for A on condition of A's ceasing to employ B.

³ [1898] A. C. 1, 98.

⁴ Knowlton, C. J., in *Berry v. Donovan*, 188 Mass. 353, 357.

employ B.¹ A thereupon ceases to employ B. A has room for both B and defendant in his business. Defendant has no personal ill will towards B. His reason is a desire to strengthen the principle of unionism in his own trade. B sues defendant.²

If a combination is regarded as unlawful *per se*, or as unlawful when there is a purpose to create a monopoly in labor, the justification here would be held bad. But if we reject these views, it does not necessarily follow that the justification must be held good.

The question then arising may be stated as follows: Are the defendants liable because the probable advantage to them is not sufficiently direct, or not sufficiently great, to justify them in inflicting this direct damage on the plaintiff or the indirect damage to the employer or to the community?

On this question the authorities are not unanimous.

The view that the justification is insufficient is supported by the courts of Massachusetts, Maryland, and Pennsylvania, and also by Mr. Justice William O'Brien and Mr. Eddy.³

It is urged that, to constitute a justification, the raising of wages or lessening of hours must be the direct and immediate result. Hammond, J., in *Plant v. Woods*, says:

"The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the

¹ Suppose that unionist journeymen in a machine shop, not content with monopolizing the journeymen's positions, threaten to leave unless a non-union foreman is dropped and a union foreman designated by themselves is substituted. If there is held to be a justification in Case 3, does this compel the conclusion that the above conduct as to the foreman is also justified? We think not. The exclusion of a non-union foreman, while it may be beneficial to the union, is not as necessary to its existence as the exclusion of non-union journeymen. Nor is the foreman a rival or competitor of the journeyman. We have stated it as one of the requisites to justification (*ante*, p. 361) that the damage resulting to the plaintiff or to the general public (including the employer) must not be excessive in proportion to the benefit to the defendant. It is evident that the damage to the employer must be much greater than if the unionization of the shop is confined to the journeymen. Indeed it is difficult to see where the harm would stop. The next claim might be for the union to select the general superintendent; and next to exclude the employer altogether from personal supervision, or indeed exclude him from entering his own workshop.

² The question can be varied by supposing B to be a member of a rival union.

³ *Plant v. Woods*, 176 Mass. 492; *Berry v. Donovan*, 188 Mass. 353; *Erdman v. Mitchell*, 207 Pa. St. 79; *Lucke v. Clothing C. & T. Assembly*, 77 Md. 396; *William O'Brien, J.*, in *Leathem v. Craig, Ireland* [1899] 2 Q. B. & Ex. D. 667, 698; 1 *Eddy, Combinations*, 416. *Cf. Erle, Trade Unions*, 73, 74.

right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition."¹

The contrary view is forcibly stated in the dissenting opinion of Holmes, C. J., in *Plant v. Woods*:

"To come directly to the point, the issue is narrowed to the question whether, assuming that some circumstances would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendant's society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contests of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest."²

The result reached by a majority of the New York Court of Appeals in *National Protective Association v. Cumming*³ is like that of Judge Holmes; but Professor Lewis points out a radical difference in the reasons given.⁴

¹ 176 Mass. 492, 502. And see Knowlton, C. J., in *Berry v. Donovan*, 188 Mass. 353, 359.

We are here discussing Case 3 upon the supposition (*ante*, pp. 358, 253) that such a movement against the employment of non-unionists can be, and is, carried on without resorting to the unlawful method of using or threatening force, either against the persons of the non-unionists or the property of the employer. But it may be contended that this supposition hardly ever accords with the actual fact; that a movement of this sort, supported as it generally is by bitter denunciation of the non-unionist, is certain to result in the use or threat of violence by a part of the unionists; and that the remainder of the unionists will make no effectual effort to restrain their fellows. In the majority opinion in *Plant v. Woods*, *supra*, 496, 497, Judge Hammond assumes that such results are always to be expected. If it is practically impossible to carry out such a movement peacefully, then it may be urged that the law should not permit the movement to be undertaken, and that hence the attempted justification in the present case should be held bad.

As to the special reasons for expecting a resort to violence in a labor contest of this particular kind, see Professor Bullock in 94 Atl. Monthly 438.

² 176 Mass. 492, 505. "To Trade Unionists Non-Unionists are permanent rivals; acting in their own interests, they undersell them in the labor market, take the side of the employer against the Unionists in time of strike, and if the strike is successful seek to share the fruits obtained by the sacrifices of the Unionists." Sir Godfrey Lushington, Report of Royal Commission, 90.

See the discussion in Mitchell, *Organized Labor*, c. 32: "The Unionist and the Non-Unionist."

³ 170 N. Y. 315.

⁴ 44 Am. L. Reg. (N. S.) 496.

In the decision of *Allen v. Flood*, in the House of Lords, the majority of the Law Lords held that there was not even a *prima facie* tort, and hence they had no occasion to decide what would constitute a justification. But, if that question had been considered material, we should infer that some, at least, of the majority Lords would have taken the same view as Judge Holmes. The opinion of one of the ablest of the majority, Lord Herschell, leaves little doubt as to his concurrence.¹

The question has repeatedly arisen in mercantile transactions whether it is unfair competition for a trader (or a combination of traders) to insist that those who deal with him shall not deal with his rivals as to the subject-matter of rivalry. Here again the authorities are not unanimous, but there is more tendency to sustain the justification, and the authorities which sustain such conduct in mercantile transactions may fairly be cited to justify the conduct of labor unionists in the case now under consideration. Professor Bullock says: ² "To refuse to sell sugar or tobacco to a dealer who will not agree to buy from no other source is precisely like the refusal of laborers to work for a person who will not buy all his labor from the trade-union." ³ Some of the cases ⁴ will be referred to in connection with the discussion of *Temperton v. Russell* under Case 11.⁵

¹ [1898] A. C. 1, 141. See also Lord Shand, p. 167.

² 94 Atl. Monthly 436.

³ The theory that there is a perfect analogy between the cases of mercantile competitors and labor competitors seems inconsistent with the decision in *Cleland v. Anderson*, 66 Neb. 252. The statute there under consideration punished any combination of dealers intended "to prevent others from conducting or carrying on the same business," or which tended "to prevent or preclude a free and unrestricted competition among themselves or others or the public generally." Section 9 of this statute expressly excepted from its operation organizations of laboring men for the purpose of raising wages. It was held that this exception did not make the statute unconstitutional. We think this decision erroneous (*ante*, p. 353), and it is admitted to be in direct conflict with *Ins. Co. v. Cornell*, 110 Fed. Rep. 816, 825. But if the Nebraska decision is sustained, the labor unions can no longer rely on the supposed analogy in support of their demand (see *post*, under Case 11) that the common law should allow the laborer the same methods of economic warfare which it allows to the trader; they cannot take inconsistent positions, according to their varying interest. They cannot deny the analogy when the constitutionality of the Nebraska statute is in controversy, and then insist on the existence of the analogy in order to enjoy certain competitive rights at common law.

⁴ See authorities collected by Professor Wyman, 17 Green Bag 200, 222; also 18 HARV. L. REV. 446; 44 Am. L. Reg. (N. S.) 472, 473; Sir Godfrey Lushington, Report of Royal Commission, 90.

⁵ As to the constitutionality of a statute making it a criminal offense to make it a

If the application of Judge Holmes' view in *Plant v. Woods* can be confined (as we think it can and should be) to threatened "strikes" in support of the principle of unionism in the strikers' own trade, we should be inclined to favor Judge Holmes' view and hold the justification in *Case 3* sufficient. But if courts are to hold that this view necessitates the further concession that members of a union in one trade may take such action in behalf of the principle of unionism in other trades, then we should prefer to reject Judge Holmes' view.

Of course, if such means (as in *Case 3*) can be resorted to in order to strengthen the prestige of unions and to promote the spread of unionism, it must be allowable to use similar means to weaken unions and to prevent their growth.¹ Non-unionists must have correlative rights as against unionists, and employers must be at liberty to form a combination not to employ unionists (to refuse employment to unionists).²

Case 4. B, a non-union carpenter, is making repairs on A's dwelling-house, under a contract terminable, at any moment, at the will of either party. Defendant, a union printer who is working in A's publishing establishment under a similar contract, tells A that he will quit A's employ unless A ceases to further employ B. Thereupon A ceases to employ B. Defendant was actuated by a desire to strengthen the general principle of unionism in all trades. B sues defendant.

Case 4 raises the question whether, in the absence of any ex-

condition of the sale of goods that the purchaser shall not sell or deal in the goods of any person other than the seller, see *Com. v. Strauss*, 191 Mass. 545.

¹ Lord Shand, in *Allen v. Flood*, [1898] A. C. 1, 169; and *cf.* *Knowlton, C. J.*, in *Berry v. Donovan*, 188 Mass. 353, 360.

² The bill pending in the British Parliament gives immunity to combinations of masters as well as combinations of men.

In *Boyer v. Western Union Tel. Co.*, 124 Fed. Rep. 246, it was held that discharging men because members of unions, and keeping a blacklist of their names and the reason for discharge, was not unlawful. See also *Willis v. Muscogee Mfg. Co.*, 120 Ga. 597. *Cf.* *Bulcock v. St. Anne's, etc., Federation*, 19 T. L. R. 27.

In *People v. Marcus*, 185 N. Y. 257, a statute prohibiting any person from making the employment of another conditional on the employee not joining or becoming a member of a labor organization was held unconstitutional.

Statutes making it unlawful to discharge an employee because he belongs to a labor organization have been held unconstitutional. *State v. Kreutzberg*, 114 Wis. 530; *Gillespie v. People*, 188 Ill. 176; *State v. Julow*, 129 Mo. 163; *Coffeyville, etc., Co. v. Perry*, 69 Kan. 297.

A statute relative to employment offices, which discriminated against employers in case of a lock-out or a strike, was held unconstitutional in *Matthews v. People*, 202 Ill. 389.

press agreement of alliance, the interest of men in one trade in the general principle of unionism is so great as to justify them in inflicting damage on persons whose conduct is hostile to unionism in another trade (*i. e.*, hostile to the interests of a union composed of men in another trade). Assuming that unionist printers may take certain measures in behalf of the principle of unionism in their own trade, can they adopt the same sort of measures in behalf of unionism among carpenters? Does the fact that they are all hand workers or wage earners create such a common interest as to bring certain measures within the limits of self-defense? ¹

Of course, if we repudiate the view of Chief Justice Holmes in *Plant v. Woods*, then, *a fortiori*, there is no justification in Case 4.

But if we adopt the Holmes view and concede that the men of one trade may take certain defensive measures to strengthen the principles of unionism in their own trade, then the question comes whether they may take similar measures to strengthen the principle of unionism in another trade. Does logical consistency require the extension of the Holmes view to the latter case; and if logic might so require, does expediency forbid?

We think that it should not be so extended.²

It may be urged that the difference between Cases 3 and 4 is only one of degree. But, as Judge Holmes has said, most differences, when nicely analyzed, are differences only of degree.³ Here the differences of degree are very marked. The interest of the printer in the prosperity of the carpenter is much less than in that of men of his own trade; and the same is true, to a large extent, as to the success of unionism in the two trades.⁴ On the other hand, the

¹ "The cause of one laborer is the cause of all laborers. Organized labor must give to each of its members its collective force and influence, else they will fall, one by one, a sacrifice to the greed of their employers." Dissenting opinion of Caldwell, J., in *Hopkins v. Oxley Stave Co.*, 83 Fed. Rep. 912, 935. The learned judge was here answering the objection that only one member of a labor combination was in the employ of the plaintiff company.

² If our conclusion is correct, the well-known case of *National Protective Ass'n v. Cummings*, 170 N. Y. 315, should have been decided for plaintiff. The defendants (walking delegates) threatened the employer that if he did not discharge the members of the plaintiff association, the defendants "would cause a general strike of all men of other trades employed on said buildings."

³ *Rideout v. Knox*, 148 Mass. 368, 372. In *Haddock v. Haddock*, 201 U. S. 562, 631, the same learned judge said: "I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it."

⁴ "Another objection to the sympathetic strike is the fact of its remoteness. The public may sympathize with oppressed tailors who are struggling for better condi-

exercise of the right claimed by men of all trades to take such an active part¹ in an economic conflict between the men of one particular trade and their employer would operate to the great disadvantage of the employer. Nor is this all. The effect would be harmful to the general public; and there is a "growing conception of the public as a distinct entity having rights."² If economic war on the part of all workmen in all trades can be declared whenever there is a controversy in any one trade, there must always be great uncertainty as to the completion of any business undertaking in any trade, and as to obtaining the necessities of life. Undoubtedly there may be close questions as to where the line shall be drawn between certain occupations, to determine whether men pursuing them belong to the same trade or to different trades. But this is a difficulty only of fact, and does not furnish a reason for considering all trades as identical with each other. Whether pressmen and compositors belong to the same trade or not (whether they both belong to the printing trade or not), they certainly do not belong to the same trade as carpenters.

Case 5. Add to Case 4 the following statement:

The members of each trade have their separate unions; but these unions have in turn formed a federation of trades. By the agreement of federation, whenever the interest of any one of the allied trades is involved the interests of all shall be deemed to be involved, and the members of each trade are bound to take the same defensive measures which they might lawfully adopt if their own trade were the one especially affected.

tions, but it will not sympathize with waiters, teamsters, bricklayers, or railroad employees, if by any chance they strike sympathetically with the garment workers. The public finds in the original quarrel no justification for the intervention of the new unions, and it fears that by means of sympathetic strikes a conflict originally limited in its scope may become extended so as needlessly to involve the entire labor world." Mitchell, *Organized Labor*, 303.

"... in any given state or territory there is a wide divergence and dissimilarity of interest between its miners and its locomotive engineers, its carpenters and its garment workers, its glass blowers and its waiters, its doctors and its farmers, its manufacturers and its newspaper writers, even though these various people live and work in the same city or on the same street." *Ibid.* 400.

To prevent misapprehension, it should be added that Mr. Mitchell believes that sympathetic strikes, though to be resorted to only in the most extreme cases, are sometimes justifiable. *Ibid.* 304.

¹ Men of other trades may use persuasion and argument, because these methods are not *prima facie* actionable and require no justification. But if they exert economic pressure, "they have not sufficient interest in the result to justify their act, if their act requires justification."

² Prof. Bigelow, in *Centralization and the Law*, 7.

Assuming in Case 4 that the union printer would be liable in the absence of any alliance or federation among the different trades, does the formation of such an alliance as supposed in Case 5 render conduct lawful which would otherwise be unlawful? Will the law recognize, and as it were uphold, an artificial unity of interest, growing out of (created by) the defendant's own agreements *inter se*?

This inquiry must be answered in the negative.

The question is somewhat analogous to the point considered in *Boutwell v. Marr*¹ and *Martell v. White*.² In these cases members of a union had enforced a penalty against a fellow member for dealing with the plaintiff, and had thereby damaged the plaintiff's business. They set up the defense that the penalty was provided for by the rules of the union, to which all its members had agreed. But the court held that the initial agreement of a member that a penalty may be imposed upon him does not make the imposition of such a penalty a lawful mode of attack upon the business of a third person. If the agreement of the members cannot directly justify conduct otherwise unlawful, can their agreement indirectly justify it by creating an artificial interest to serve as a foundation for the exercise of self-defense? Does a combination enjoy greater immunity than an individual?

Case 6. Defendant, a union carpenter, is working for A, a builder, under a contract terminable, at any moment, at the will of either party. A is in the habit of buying his family meat from B, a butcher who employs non-union journeyman butchers. Defendant threatens to quit A's employ, unless A ceases to buy meat of B. Thereupon A ceases to buy meat of B. B sues defendant.

Case 7. Defendant, a union journeyman butcher, is working in A's meat market under a contract terminable, at any moment, at the will of either party. A is in the habit of selling meat to B, who employs non-union carpenters. Defendant threatens to quit A's employ unless A ceases to sell meat to B. Thereupon A ceases to sell meat to B. B sues defendant.

Even if there can be any question as to the invalidity of the justification in Case 4, it seems impossible to entertain any doubt as to Case 6 and Case 7. The condition here sought to be imposed is not that A shall himself refrain from employing non-union laborers. It is far more sweeping; namely, that A shall not have dealings with another person who employs non-unionists, even

¹ 71 Vt. 1.

² 185 Mass. 255.

though (as in Case 6) such dealings have no relation to the particular work on which the defendant would be engaged. The benefit likely to result to the defendant is much less, and the probable damage to the employer and to the community is much greater, than in Case 3 or Case 4.

If a contrary view is adopted, what limit is there to the conditions which may be imposed with a view to causing damage to persons other than the offeree? What of a condition that the employer shall cease to subscribe towards the support of a certain clergyman, or that he shall not contribute to the campaign fund of a particular candidate, or that he shall not vote for such a candidate?¹

Case 8. Defendant, a union bricklayer, is working for A, a builder, under a contract terminable, at any moment, at the will of either party. A is in the habit of buying bricks from B, who employs non-union brickmakers. Defendant threatens to quit A's employ unless A ceases to buy bricks of B. Thereupon A ceases to buy bricks of B. B sues defendant.

Case 9. Defendant, a union brickmaker, is working in A's brickyard under a contract terminable, at any moment, at the will of either party. A is in the habit of selling brick to B, an employer of non-union bricklayers. Defendant threatens to quit A's employ unless A ceases to sell brick to B. Thereupon A ceases to sell brick to B. B sues defendant.

Cases 8 and 9 both differ in one respect from Case 6. Like 6, they are attempts to regulate the employer's dealings with other persons who are not his employees. But, unlike 6, the dealings have some relation to the particular work on which the defendant would be engaged. One relates to the obtaining of the material on which the defendant is to work; the other relates to the disposition of the product manufactured by the defendant's labor. We think, however, that the justification is not good. The defendant does not simply exercise his right not to work. Such conduct might not need justification. But, instead, he is offering to refrain from exercising his right on condition that another person (A) will take action damaging to the plaintiff (B).² Such conduct is *prima facie* actionable; and the attempted justification is not sufficient. The damage to B, and to the employer (A), and to the community would be excessive in proportion to the benefit to the

¹ Defendant threatens to "boycott" any one boarding, or selling necessities to, any servant employed by plaintiff. The effect is to prevent plaintiff from obtaining help. Held, an action lies. *Patch Mfg. Co. v. Protection Lodge, etc.*, 77 Vt. 294.

² See, more fully, *ante*, pp. 272-274; 358, 359.

defendant. B has a right that A should be left reasonably free to purchase of B or to sell to B.¹ The attempted condition imposes an undue restriction upon A's freedom in purchasing material and in selling finished product. It goes further than Case 3, where the attempted restriction relates to the class of persons employed by A himself in working up the material after he has purchased it. If we were right in the answer to Case 4, then *a fortiori* the above conclusion is correct. If the defendant is not justified, as against a third person, in imposing a condition as to who shall be hired by his employer in trades other than his (defendant's) own, then he cannot impose a condition as to who shall be engaged by outsiders with whom his employer has dealings.²

¹ *Ante*, p. 260.

² Under Case 8, see *Purvis v. Local, etc.*, 214 Pa. St. 348; also *Purington v. Hinchliff*, 219 Ill. 159.

Under Case 11, *post*, cases are cited where the defendant's conduct was similar to that in Case 8 or Case 9, but with the additional fact that the defendant also exerted "economic pressure" upon customers of A in order to induce such customers to exert in their turn similar pressure upon A. See, *e. g.*, *Moore v. Bricklayers' Union*, 23 Oh. Wkly. Bul. 48.

As to Case 9, *Lyons v. Wilkins*, [1896] 1 Ch. 811, is a very strong authority for plaintiff. In that case there was a strike against Lyons for the purpose of getting wages raised. Schoenthal was a manufacturer who employed workmen under him separately, but who did work at his own place of business as a "sub-manufacturer" for Lyons. The defendants, trade union officials, intimated to Schoenthal that if he went on working for Lyons they would call out his workmen; and the workmen were called out accordingly. (In Appendix II to the Report of the Royal Commission, p. 104, it is said that defendants ordered "a secondary strike" against Schoenthal.) This threat to call out Schoenthal's workmen was made, "not because they objected to the wages that he was giving them, not in order to make a strike of the workmen for the sake of those workmen as between them and their own employer, but for the express and direct purpose of preventing Schoenthal from working for Messrs. Lyons & Co., and of putting in this manner additional pressure upon Messrs. Lyons & Co. so as to induce them to come to the terms which they wished to establish between Messrs. Lyons & Co. and the workmen of Messrs. Lyons & Co." Kay, L. J., p. 829. "There was no dispute between Mr. Schoenthal and his men." What the union did "was to call out Mr. Schoenthal's men in order to prevent him from working for Messrs. Lyons, and thus to compel Mr. Schoenthal, who was willing to work for Messrs. Lyons, not to work for them, by depriving him of the men wherewith to work for Messrs. Lyons, and by this means to injure Messrs. Lyons in their trade, if they did not obey the edicts of the union." A. L. Smith, L. J., p. 834. The proceedings of the union were held unlawful.

If the conduct of the unionists in that case was unjustifiable, much more would it have been so if Schoenthal, instead of working on material owned by Lyons, had been working on his own material and afterwards selling the finished product to Lyons.

In *State v. Van Pelt*, 136 N. C. 633, it was held that defendant unionists were not criminally punishable for combining to damage an employer of non-unionists by notifying the public that the defendant unionists would not work on material purchased

Case 10. Unionists in a particular trade refuse to buy goods made by non-unionists in that trade, and give notice that they will so refuse. Such notice is given with intent, either to prevent retail merchants from purchasing such products of the manufacturer, or to induce the manufacturer to cease employing non-unionists. Suit is brought by manufacturer; or by non-unionist who has been dropped from employ of manufacturer without breach of contract.

Are the unionists justified?

Here "the power of the workingman as a consumer is enlisted in support of his demands as a producer."¹

The relation of the unionists to the product, in case they purchased it and used it for their own purposes, would be more direct than in Case 8, where they would be connected with it only by working on it while the property of another. In Case 10 they would, if purchasers, become owners in their own right and consumers.² In Case 8 they would merely be working on it for the ultimate benefit of another. In Case 10 their interest is more directly served by their refusal than in 8; and the embarrassment and confusion resulting to the business relations of other parties would probably be less than in 8.

In Case 10 we incline to think them justified; but the decision of the majority of the court in *Hopkins v. Oxley Stave Co.* is opposed to this view.³

from him. Connor, J., said, p. 658: "There is no complaint that the conduct of the defendants was intended to injure non-union men. This case has no such element in it, and we do not wish to be understood as expressing any opinion in regard to it. The question has been before other courts. There is a painful absence of harmony in the decisions."

¹ Mitchell, *Organized Labor*, 293.

² "... a product may be boycotted either by a refusal to buy it or a refusal to work on it or with it." Mitchell, *Organized Labor*, 287.

³ In *Hopkins v. Oxley Stave Co.*, 83 Fed. Rep. 912, affirming 72 Fed. Rep. 695, the Coopers' Union and labor unions in other trades induced the Oxley Company's customers to refrain from buying machine-hooped barrels of the Oxley Company, by threatening that labor unionists would refuse to buy commodities packed in such barrels. An injunction was granted, the literal terms of which are not stated. Caldwell, J., in his dissenting opinion, p. 933, says that the defendants "are enjoined from refusing to buy the barrels, and the commodities packed in the same." This would, of course, be going too far. Probably the main feature of the decree consisted in enjoining the defendants from inducing (or from combining to induce) the Oxley Company's customers not to buy the barrels by threatening that the defendants would refuse to buy commodities packed in the barrels. The majority of the court were probably influenced by the idea that combination was in itself an unlawful method; and also by the idea, pp. 918, 921, that a "conspiracy to compel a manufacturer to abandon the use of a valuable invention" is one to accomplish an unlawful end. If the Coopers' Union

Suppose that unionists of a particular trade do not merely abstain from buying goods manufactured by non-union laborers of another trade, but also give notice to retail merchants that they will refuse to buy; and suppose that such notice is given with the intention of preventing retail merchants from purchasing these goods of the manufacturer, or with the intention of preventing the manufacturer from continuing to employ non-unionists. Can the giving of this notice be justified? Does not this present the same question as where unionists of one trade give notice that they will refuse to work for a man who employs non-unionists in another trade? That question was considered under Case 4, *ante*, and the ground taken was that such notice is unjustifiable as against the non-unionists.

CASE 11. Defendant is a union carpenter, working for A, a builder, under a contract terminable, at any moment, at the will of either party. A is in the habit of buying lumber from B, who also sells lumber to X, an employer of non-union carpenters. Defendant threatens to quit working for A unless A ceases to buy lumber of B. Thereupon A ceases to buy lumber of B. B sues defendant.

In Case 11 the interest of the defendant is even more remote than in Case 8 or Case 9. The defendant has no fault to find with the manner in which B manufactures his lumber or with the source from which he obtains the material. B is not a competitor, or rival, or antagonist, or employer of the union workmen; yet they are attempting to restrict his liberty in the matter of disposing of his property to whomsoever he wishes. There is no valid justification, as against B.

This is much like one branch of the case of *Temperton v. Russell*.¹

Temperton is a dealer in building materials. Myers is a builder who refuses to conform to labor union rules in the conduct of his business. The union requests Temperton to cease selling material to Myers. Temperton refuses this request. Thereupon the union officials notify Brentano, another builder who is accustomed to buy materials of Temperton, that the union men will refuse to work upon any material purchased of Temperton. In consequence of this notice, Brentano ceases to purchase materials of Temperton, a result desired by the union.

alone had made the threats, they would seem to have a sufficient interest to justify their conduct.

¹ [1893] 1 Q. B. 715.

Temperton sues the union officials for the loss of Brentano's custom. It is held that he can recover.¹

"Have A and B, in the course of combined competition with C, the right to attack D, with whom they are not in direct competition, in order to effect the object of driving C out of the market? Will the object of competition, which has been held by the highest tribunal to justify combined injury to trader C, excuse an injury effected by combined action to trader D, who is not, as is trader C, in the position of a direct rival?"²

Here the unionists' only ground of complaint is because Temperton refused to be an instrument of vicarious attack on their part against Myers. If it is allowable for them to inflict damage upon Temperton for such a cause, they can next proceed to inflict similar damage on A because he refuses to cease dealing with Temperton, and then on B because he refuses to cease dealing with A, and so on to the end of the alphabet.

Whatever may be the dicta in *Allen v. Flood*, there is no inconsistency between the actual decision in that case and the result

¹ For American authorities tending to sustain the result reached in *Temperton v. Russell*, and also tending to sustain the action in *Case 12, post*, see *Loewe v. California, etc., Federation*, 139 Fed. Rep. 71; *Pickett v. Walsh*, 78 N. E. Rep. 753 (Mass., 1906); *March v. Bricklayers', etc., Union*, 63 Atl. Rep. 291 (Conn., 1906); *My Maryland Lodge v. Adt*, 100 Md. 238; *Beck v. Railway Teamsters, etc.*, 118 Mich. 497; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101; *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135; *Matthews v. Shankland*, 56 N. Y. Supp. 123; *Moore v. Bricklayers' Union*, 23 Oh. Wkly. L. Bul. 48; *State v. Glidden*, 55 Conn. 76; *Crump v. Com.*, 84 Va. 927.

See also *Purvis v. Local, etc.*, 214 Pa. St. 348.

The recent decision in *Bender v. Local Union 118*, 34 Wash. L. Rep. 574, is contrary to the above authorities.

In *March v. Bricklayers' Union, supra*, a union composed of bricklayers and plasterers voted to refuse to handle brick from any manufacturer delivering brick to boss masons employing non-union men. March, a manufacturer, sold brick to a boss mason employing non-union men. The union voted "to place damages of \$100" against March. Afterwards March began delivering brick to a boss mason employing union men. The union demanded payment of the \$100 under a threat that, unless payment was made, the men employed by the boss mason would refuse to handle the brick. Payment was made. It was held that March could recover back the payment; its exaction was an act of extortion in violation both of the Connecticut statute and of common law principles. *Prentice, J.*, said, p. 293: "It is further said that the action of the defendants was justified in the exercise of the rights of fair trade competition. If it be assumed that these journeymen bricklayers and this brick manufacturer, whose business touched each other only in that the latter sold brick to persons for whom the former worked, are to be regarded as trade competitors, so that the recognized doctrines applicable to such competitors are applicable to them, it yet remains that the means resorted to in this case would not be permitted."

² *Chalmers-Hunt, Trade Unions*, 100.

reached in *Temperton v. Russell*. Even if the workmen in *Allen v. Flood* had themselves given notice of their conditional intention to leave, the case against them would have been weaker than that against the defendant in Case 11 :

(a) Because there the defendants would be exerting pressure only upon persons for whose custom they were in competition with the plaintiffs, namely, upon their employers.

(b) Because the mode of pressure on their employers consisted solely in threatening certain action on their own part, without inducing action on the part of outsiders.

It has sometimes been asserted, or implied, that the decision in *Temperton v. Russell* (as well as the decision in *Quinn v. Leathem*), denies to the laborer a right which is allowed to the trader; that a method of warfare is there held inadmissible in labor conflicts which has been adjudged lawful in trade competition.¹ The *Mogul* case is usually cited, and the *Glasgow* case probably will be cited, as a typical instance of methods of competition thus permitted to traders. But a careful comparison of the precise questions presented in the *Mogul* and *Glasgow* cases with those involved in the *Temperton* case will show that the objection is not well taken.

In the *Mogul* case² a number of ship owners formed a combination and offered specially favorable terms to shippers who would deal exclusively with vessels belonging to the combination. They offered local shippers a benefit by way of rebate if they would not deal with their rivals, the plaintiffs, but would deal exclusively with the combination. The rebate was to be forfeited if this condition was not fulfilled.³

In the *Glasgow* case⁴ a more drastic measure was adopted; not merely offering more favorable terms to a party if he would deal

¹ See 8 HARV. L. REV. 7 and 8; Lord Dunedin's note in Report of Royal Commission, 19; Nat. Rev. for March, 1906, pp. 65, 66; see also Professor Lewis' comparison of the "labor boycott cases with the trade boycott cases," 44 Am. L. Reg. (N. S.) 491-492, and 498.

² *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598; [1892] A. C. 25.

³ The combination also refused to continue to employ as shipping agents persons who were also undertaking to act as shipping agents for their rivals. This refusal seems clearly justified on the grounds stated by Lord Watson and Lord Morris. The agents would be filling "an irreconcilable position in being agents for the two rivals . . ." See [1892] A. C. 43, 50; also Lord Dunedin's note in Report of Royal Commission, 19. Cf. Prof. Lewis, 44 Am. L. Reg. (N. S.) 498, 499.

⁴ *Scottish Co-operative Wholesale Society, Ltd. v. Glasgow Fleshers' Trade Defense Association*, 35 Scot. L. Rep. 645.

exclusively with defendants; but declining to deal at all, as to the business in hand, with a party who dealt, as to that business, with the defendants' competitors. American cattle were sold at only one place in Scotland; the sale there being by auction. Among the principal probable purchasers were on the one hand certain co-operative societies, and on the other hand an association of butchers who were competing with the co-operative societies in the retail sale of meat. The butchers notified the cattle salesmen that they would not buy at their auction sales, unless the salesmen declined to sell to the co-operative stores. The cattle salesmen yielded to this pressure, and intimated in their conditions of sale that they would not accept the bids of persons connected with the co-operative stores; the result being that the co-operative societies were cut out of the foreign meat market.

In both the Mogul and the Glasgow cases it was held that the methods of competition adopted did not give a cause of action.¹

The pressure in the Temperton case goes beyond that in the Glasgow case, both as regards the number and character of the persons attempted to be influenced, and also as to the subject-matter in respect to which the influence was exerted. In the Glasgow case the only party attempted to be influenced was the party carrying on the business in respect to which the plaintiffs and defendants were in competition. And the threat of refusing to deal with that party in case he should deal with the defendants' rivals was limited to the exact subject-matter of rivalry, to dealing in the precise thing concerning which the competition existed.

If the union workmen in the Temperton case had said to Myers, "We shall cease to work for you unless you cease to employ non-unionists," such a threat might have been justified on the analogy of the Glasgow case or the Mogul case. But instead of this, they in effect said to Brentano, "We shall cease to work for you, unless you cease dealing with Temperton, who sees fit (or, so long as he sees fit) to disregard our request that he will cease dealing with Myers."

In the Temperton case, instead of exerting pressure solely upon Myers, the party with whom the unionists are in controversy, the unionists exert pressure upon Brentano, either to induce Brentano to exert pressure upon Temperton for the purpose of inducing Temperton to take action damaging to Myers, or to induce

¹ See comments in 18 L. Quar. Rev. 4 and 5.

Brentano to punish Temperton for refusing to take such action. In other words, the defendants successively attack, or threaten to attack, two outside parties to compel them to take part in the war or to be punished for remaining neutral. And the subject-matter in reference to which non-intercourse is threatened is, in neither instance, the same as that in controversy between the unionists and Myers.

In the Mogul case the defendants did not say, "If any merchant ships goods by the rival lines, we shall refuse to ship goods for any man who is a customer at that merchant's retail store"; nor did they say, "If any merchant ships goods by the rival lines, we shall refuse to have any dealings on any subject whatever with any man who is a customer at that merchant's retail store." In the Glasgow case the defendants did not say to the salesmen of the foreign cattle, "If you sell cattle to the co-operative societies, we shall refuse to sell meat to any landlord who rents you a stock-yard or a tenement." The distinction between the Temperton case on the one hand and the Glasgow and Mogul cases on the other hand is well illustrated by a very recent case raising two distinct questions, one of which was decided in favor of the defendants and the other in favor of the plaintiff. This is the case of *Pickett v. Walsh*, decided in the Supreme Court of Massachusetts, October 16, 1906.¹

The plaintiffs were brick and stone "pointers." The defendants were officers and members of bricklayers' unions and stonemasons' unions.

One ground of complaint was that the defendants prevented the employment of the plaintiffs as "pointers" by notifying contractors that they would not lay the bricks or do the mason work on any building unless they were also employed to do the pointing of the brick and stone masonry. "The defendants in effect say we want the work of pointing the brick and stone laid by us, and you must give us all or none of the work."² The court held that this conduct, although disastrous to the plaintiffs and damaging to the building contractors, was justifiable. "... it was within the rights of these unions to compete for the work of doing the pointing, and, in the exercise of their right of competition, to refuse to lay bricks and set stone unless they were given the work of pointing them when laid."³

¹ 78 N. E. Rep. 753; 34 Banker and Tradesman 2414.

² Loring, J., p. 758.

³ Loring, J., p. 758.

The other ground of action in *Pickett v. Walsh* was quite distinct from the foregoing. The firm of L. P. Soule & Son Company were the general contractors for the erection of the Ford building; but they had nothing to do with the employment of "pointers." The pointing of that building was being done under a contract between the owners of the building and Pickett, a pointer who was one of the plaintiffs. Other buildings were being erected for other owners, on which the Soule Company were the general contractors, and as to which no complaint existed in reference to the pointing. The bricklaying and masonry on these other buildings were being done by members of the defendants' union. The defendant officials induced all the bricklayers and masons to quit working for the Soule Company on these other buildings, because that company "was doing work on another building [the Ford building] in which work was being done by pointers, employed not by the L. P. Soule & Son Company but [by] the owners of the building." The evident purpose was to thus induce the Soule Company to exert pressure on the owners of the Ford building to discontinue the employment of the pointers (*Pickett et als.*). The court held that this conduct was not justifiable. The decision is not based on the ground that the defendants were intentionally inducing, or attempting to induce, a breach of contract; but on the broad ground that the forcing a neutral third person to exert a pressure on the plaintiff's employer was not a lawful means of competition. Loring, J., said:¹

"That strike has an element in it like that in a sympathetic strike, in a boycott, and in a blacklisting, namely: It is a refusal to work for A, with whom the strikers have no dispute, for the purpose of forcing A to force B to yield to the strikers' demands. In the case at bar the strike on the L. P. Soule & Son Company was a strike on that contractor to force it to force the owner of the Ford building to give the work of pointing to the defendant unions. That passes beyond a case of competition where the owner of the Ford building is left to choose between the two competitors. Such a strike is in effect compelling the L. P. Soule & Son Company to join in a boycott on the owner of the Ford building. It is a combination by the union to obtain a decision in their favor by forcing third persons who have no interest in the dispute to force the employer to decide the dispute in their (the defendant union's) favor. Such a strike is not a justifiable interference with the right of the plaintiffs to pursue their calling as they think best. In our opinion organized labor's right of

¹ P. 760.

coercion and compulsion is limited to strikes on persons with whom the organization has a trade dispute; or to put it in another way, we are of the opinion that a strike on A, with whom the striker has no trade dispute, to compel A to force B to yield to the strikers' demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best."

Without going through all the American decisions tending in the same direction as the Mogul and Glasgow cases,¹ we may take as a typical case *Bohn Mfg. Co. v. Hollis*.² "A large number of retail lumber dealers formed a voluntary association, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers not dealers, at any point where a member of the association was carrying on a retail yard; and they provided in their by-laws that, whenever any wholesale dealer or manufacturer made any such sale, the secretary should notify all the members of the fact. The plaintiff, a wholesaler, having made such a sale directly to a consumer, the secretary threatened to send notice of the fact, as provided in the by-laws, to all the members of the association."³ The court refused to grant an injunction against sending out the notice. Here the retail dealers did not threaten to cease dealing with any one except their competitors, *i. e.*, wholesale dealers who should attempt to sell directly to consumers. They used no lever but their own conduct. They did not threaten to induce outsiders to refrain from working for, or selling goods to, the wholesalers. And even as to their own conduct, they did not threaten to abstain from dealings with wholesalers in all matters, but only in the purchase of lumber. Much less did they threaten to abstain from dealing with persons who dealt with the wholesalers. In a subsequent Minnesota case *Start, J.*, said:⁴

"It is to be noted that the defendants in the Bohn case had similar legitimate interests to protect which were menaced by the practice of wholesale dealers in selling lumber to contractors and consumers; and that the defendants' efforts to induce parties not to deal with offending wholesale

¹ As previously intimated, there are some American authorities *contra* to the principle of the Glasgow case, and inconsistent with some of the reasoning in the Mogul case. See, for instance, *Jackson v. Stanfield*, 137 Ind. 592; *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429; and other cases collected by Prof. Wyman, 17 Green Bag 210, 222.

² 54 Minn. 223.

³ This statement is copied from 17 Green Bag 218. See also statement by Prof. Lewis, 44 Am. L. Reg. (N. S.) 469.

⁴ *Ertz v. Produce Exchange Co.*, 79 Minn. 140, 144.

dealers were limited to the members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons not members of the association to withhold their patronage from such wholesale dealers.”¹

In the prominent case of *Leathem v. Craig*,² if it be conceded that the defendants might have been justified in withdrawing union men from Leathem's employ, *non constat* that they could lawfully threaten to withdraw union men from the employ of Munce, for the purpose of compelling Munce to withdraw his custom from Leathem.³ In their “war” with Leathem they had no right to augment their army by this process of conscription. Munce was a stranger to the conflict and wished to remain a neutral. Professor Dicey says:

“Even in real warfare, some slight respect is paid to rights of neutrals, and if a strike can — by a delusive figure of speech — be termed a battle between masters and men, each of the public is a neutral, who is entitled to demand that his legal rights shall be respected by both parties to the conflict.”⁴

“It was attempted,” say the Commissioners on the Anthracite Coal Strike, “to defend the boycott, by calling the contest between employers and employees a war between capital and labor, and pursuing the analogies of the word, to justify thereby the cruelty and

¹ Another American case, reaching a result similar to that in the Bohn case, and, like that case, clearly distinguishable from the Temperton case, is *Macauley v. Tierney*, 19 R. I. 255.

² *Ireland* [1899] 2 Q. B. & Ex. D. 667; s. c. in House of Lords, *sub nomine* *Quinn v. Leathem*, [1901] A. C. 495.

³ In *Booth v. Burgess*, 65 Atl. Rep. 226, 237 (N. J., Nov. 22, 1906), *Stevenson, V. C.*, takes the ground that if the union workmen of Munce had voluntarily combined to give notice of their intention to quit Munce's employ unless Munce ceased buying meat of Leathem, they would not have been liable to Leathem for the loss of Munce's custom. It is clear that this very able judge would disagree with the views we have heretofore expressed (*ante*, 272-274, 358, 359) as to conditional notices or threats. He sustains the result in *Quinn v. Leathem* on the ground (pp. 232, 233, 237) that the union officials proposed to coerce Munce's union workmen by threats of fine or expulsion. In the course of his opinion the learned judge acutely criticizes the common use of the term “justification,” though he admits that “the use of such phraseology is certainly sustained by abundant analogies.” See 65 Atl. Rep., at 229, 233, 228.]

See also another late New Jersey case, decided in the Court of Errors, Nov. 19, 1906, *Brennan v. United Hatters*, 65 Atl. Rep. 165, where Pitney, J., says, p. 171: “It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former.”

⁴ Nat. Rev., Oct., 1906, p. 217.

illegality of conduct on the part of those conducting a strike. The analogy is not apt, and the argument founded upon it is fallacious. . . . War between citizens is not to be tolerated, and cannot in the proper sense exist. . . . The practices, which we are condemning, would be outside the pale of civilized war."¹

In using his real estate, the owner, X, may with impunity do some things on his own land which he knows will result in damage to his neighbor B; and by the weight of English and American authority he is not held liable, even though he was actuated by ill will to B. But suppose that X threatens his neighbor A that he will do something on X's land which will damage A, unless A will make a use of A's land which will damage B; and that A, influenced by this threat, thereupon uses his own land in such a way as to damage B. Would it be held that X's right (although sometimes spoken of as an "absolute right") to make a certain use of his own land justified him in thus coercing A to make a certain use of A's land and thus produce damage to B? The gist of the complaint against X is not that he exercised against B a right which he (X) possessed. It is that he caused another person (A) to exercise a right which that other person possessed. The right of user of real estate has been said to be a right of the most highly privileged kind, but it could hardly be stretched to cover such a case as has just been supposed.

Case 12. Union carpenters, whom a builder employs by the day, notify the builder that they will leave at the close of the day unless he notifies A, a grocer, that he (the builder) will stop buying groceries of A, unless A ceases to employ B, a non-union clerk, whom A hires by the day. The builder gives the notice, and thereupon A ceases to employ B. B sues the union carpenters.²

Here the defendants do not use only their own conduct as a lever and therewith operate directly upon the employer of B. They use their own right (to work or not to work) as a temporal inducement to influence their own employer to exert pressure, by temporal inducement, in his turn upon the employer of the plaintiff, B. The builder is an outsider, so far as concerns either the relation between the grocer and his clerk or the conflict between allied unions and the employers of non-unionists. The defendants, by temporal inducement, have forced an outsider, who would otherwise have remained neutral, to take part in the conflict.

¹ Report, 78.

² See authorities cited *ante*, p. 442, n. 1.

In some of the cases previously considered the defendant influences the conduct of only one person. The only means or lever used to influence that person is a threat as to the future conduct of the defendant himself, a threat of loss which would result to that person from the conduct of the defendant alone.

In Case 12 the defendant influences the conduct of two other persons, one of whom is an entire stranger to the controversy; and he uses the second to influence the first. If he can do this, then he can influence a third person to influence the second; or influence an indefinite number in succession to influence each other in turn. He can drag the whole community into his dispute.¹

Case 13. A employs a non-unionist carpenter, B, whom he hires by the day. He refuses to drop B at the request of the unionists. A owns a tenement house, occupied by C, a tenant at will. D, a baker, is in the habit of selling bread to C. The unionists notify D that they will call out his unionist journeymen bakers, and will cease to buy bread of him, unless he (D) notifies C that he shall cease to sell C bread so long as C occupies a tenement of A's. D gives such notice to C, and C, in consequence, moves out of A's house. The unionists also give public notice that, if A does not drop B, they not only will refuse to work for A, but will not work for, or buy from, any one who has any dealings of any kind with A, nor have

¹ Mr. Mitchell apparently believes in the legality of the "secondary boycott," though deploring "that the boycott occasionally is used tyrannously and unfairly, and not infrequently is carried too far."

His views are in part as follows:

"To boycott a street railway which overworks its employees and pays starvation wages is one thing; to boycott merchants who ride in the cars of the company is another thing, and to boycott people who patronize the stores of the merchants who ride in boycotted cars is still another and a very different thing. As a general rule, the further the boycott is removed from the original offender, the less effective it becomes. It should be the aim of the union to seek, and not to force, the alliance of the public, and to render the boycott as direct and personal as possible. There are many cases, however, where a secondary boycott is absolutely necessary. When a union is engaged in a contest with a newspaper, especially, as is usually the case, with a newspaper not largely read by the working classes, a secondary boycott is far more effective than a direct boycott. A newspaper can better do without a few hundred two-cent subscribers than without a few thousand-dollar advertisements; and a man who continues to pay large sums in advertising to a newspaper that is maltreating its employees may not unfairly be considered the ally of the journal, and as aiding and abetting it in its contest with labor. Especial care, however, should be used in the laying of a secondary boycott." Mitchell, *Organized Labor*, 289-290.

The successful working of Mr. Mitchell's scheme of boycotting a newspaper, by threatening to withdraw business patronage from merchants who advertise in it, has been held actionable. *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101; *Matthews v. Shankland*, 56 N. Y. Supp. 123. Cf. 44 Am. L. Reg. (N. S.) 489, 490.

any dealings with any one who deals with any person who has any dealings with A.¹

The result is that A is cut off from all business dealings, cannot induce any one to sell him provisions, and suffers the pangs of starvation, as the unionists intended that he should. A sues the union officials.

This is an application of the principle of some of the preceding cases carried out to an extreme. Such methods clearly exceed the legitimate bounds of competition or of economic warfare. It is impossible to justify them by the analogy of the Mogul and Glasgow cases.

The remaining question is: Whether bad motive operates as a rebuttal of an otherwise sufficient justification?

Will "a *prima facie* justification" on the ground of competition (defense of one's own interest) be rebutted by proof of bad motive on the defendant's part? Is an act "apparently within the domain of competition" unjustifiable if the actor's ultimate motive was, not to benefit himself, but to gratify a personal grudge against the plaintiff?

In discussing this question the terms "motive" and "intent" are used in the significations previously indicated on pages 256 and 259, *ante*. Intent is used to denote the immediate object aimed at by the doer of an act, the immediate result desired by the actor. Motive is used, not to signify the object or result immediately aimed at, but to denote the reason for aiming at that object; not to indicate the result immediately desired, but the cause for entertaining that desire, the feeling which makes the actor desire to attain that result. And we here restate² two propositions: (1) Bad motive is not generally a requisite element in making out a *prima facie* tort;³ (2) Good motive does not alone

¹ For examples of "secondary boycotts," see Report of Anthracite Coal Strike Commission, 77. See also statement of general objections to "what is popularly known as the boycott." *Ibid.*, 76-78.

² From p. 259, *ante*.

³ That an act otherwise lawful does not become actionable by proceeding from a bad motive is a proposition strongly sustained by the opinions of several of the Law Lords in *Allen v. Flood*, [1898] A. C. 1. See also Lord Lindley, in *Quinn v. Leatham*, [1901] A. C. 495, 533.

For a view giving more effect to bad motive, see the elaborate discussion by Prof. Ames in 18 HARV. L. REV. 411: "How far an Act may be a Tort because of the Wrongful Motive of the Actor."

See Prof. Lewis, in 5 Colum. L. Rev. 107-123; and *cf.* the majority opinion in *Plant*

and of itself constitute a justification for the intentional infliction of harm.

To consider now the effect of defendant's bad motive as a rebuttal of his justification:

First: It is obvious that the question cannot arise where there is no justification made out, and hence there is nothing for the plaintiff to rebut. The inquiry whether bad motive on the defendant's part does or does not exist is immaterial if we have a case where there is a *prima facie* cause of action and the defendant has not shown an apparently sufficient justification. The plaintiff, having already made out a *prima facie* cause of action, has no occasion to strengthen his case by proving bad motive (unless he claims exemplary damages). Nor can the defendant justify himself by simply proving good motive. Whatever else may be a justification, absence of bad motive *per se* is not. In some cases where the court or counsel have laid stress on bad motive, we think it will be found that the true *ratio decidendi* consists in the absence of justifying circumstances rather than in the presence of bad motive.¹

Second: Bad motive, in the true sense, seldom exists in this class of cases; *i. e.*, as between persons who are, to outward appearance, competitors in trade or labor disputes. The existence of bad motive may sometimes be admitted by filing a demurrer to a declaration; but if the defendant had traversed, instead of demurring, the plaintiff would hardly ever have been able to prove the alleged bad motive. Again it may sometimes be claimed that the existence of bad motive has been found as a fact by the jury; either by necessary implication from a general verdict or by specific findings. But in most of these cases the jury were acting

v. Woods, 176 Mass. 492. The subject of controversy is stated by some judges in a question-begging form. It is stated very clearly by Hammond, J., in 176 Mass., at 499-500.

As to the reason for the acknowledged materiality of motive as a requisite to an action for malicious prosecution, see the explanation of Lord Herschell, in *Allen v. Flood*, at 125, 126; and *cf.* Lord Watson, at 93.

¹ See, for instance, *Webb v. Drake*, 52 La. Ann. 290; *Graham v. St. Charles St. Ry. Co.*, 47 I. a. Ann. 214, 1657. *Cf.* *Ertz v. Produce Exchange Co.*, 79 Minn. 140, where the complaint demurred to "does not show that the defendants had any legitimate interest to protect."

Of course, cases which regard bad motive as an element in making out a *prima facie* tort may fairly be cited to support the doctrine that a *prima facie* justification may be rebutted by proof of bad motive. But this precise question was not before the court in the cases where the court held, or a demurrer admitted, that there was no justification. See *Plant v. Woods*, 176 Mass. 492, and *Moran v. Dunphy*, 177 Mass. 485.

under instructions which did not properly discriminate between motive and intent. The defendant frequently intends immediate harm to the plaintiff, but generally as a means of attaining the end of benefiting himself. In ninety-nine labor cases out of a hundred the defendant's motive (or, in other words, his ultimate intent) is to promote his own advantage. "As a rule, the ultimate object of a labor union in excluding an employee from work by pressure upon the employer, or in injuring the business of an employer by the persuasive or coercive boycott, is not the damage to their victim, but the advancement of the cause of labor. This motive, of course, is commendable. In the great majority of labor cases, therefore, the question whether the members of a labor union are guilty of a tort is a question, not of motive, but of the legal validity of the means adopted for effectuating their motive; and this question must be answered by a careful weighing of considerations of public policy."¹

The question, then, whether, in a case of apparent self-interest, proof of bad motive will destroy an otherwise good justification, is generally speculative rather than practical.

Third: Assuming, however, that the existence of bad motive, though extremely rare, is not an absolute impossibility, what effect shall be given to it? Shall the plaintiff be permitted by the court to prove the existence of bad motive in order to overthrow an otherwise sufficient justification, grounded on self-interest?

It is obvious that permitting the plaintiff to raise this issue would very materially diminish the value of defendant's right of self-defense, his right to justify on the ground of self-interest. The allegation of bad motive is easily made, and the contention would prolong litigation and, if tried, might involve great expense.

It will be urged that conduct actuated by wrong motive deserves no protection and ought always to be subject to a civil remedy. This mode of stating the question assumes the existence of the wrong motive. If by any process of demonstration, free from the defects of human judgment, the existence of the bad motive could be established beyond all doubt, there might be more ground for contending that the law should give damages to the plaintiff. But this is not the state of things under which this question of law has to be determined. Whether the motive was in fact bad is, and

¹ Prof. Ames, in 18 HARV. L. REV. 418, n. 3. Cf. Judge Holmes, in 8 HARV. L. REV. 8.

always will be, an open question, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is whether it is proper on grounds of public policy to remit such a question to the judgment of a jury.¹

If the issue of bad motive can be thus raised in labor conflicts, it must also be allowed in cases of ordinary trade competition, a very wide field. We think that the rarely occurring punishment of a personal enemy, who has masked his hostility under the guise of competition, would not offset the harm caused honest competitors by their being compelled to litigate the question of the fairness of their motives whenever assailed by a disappointed rival.

Leaving out of view the instances of absolute privilege in defamation, there are opposing analogies (neither of them perfect) on which each side respectively will rely.

On the one hand, conditional privilege in defamation cases may be rebutted by showing that defendant acted from a wrong motive. This analogy is relied on by Sir William Erle as to labor conflicts,² but seems to be deemed inapplicable by Lord Herschell.³ The law of defamation is "a law of absolute responsibility qualified by absolute exceptions."⁴

On the other hand, ordinary user of real estate does not, by the weight of English and American authority,⁵ make the owner liable, even though he is actuated by the motive of personal ill will to the plaintiff.

We prefer to adopt the view that a defendant has, in this respect, the same immunity in exercising his right to work or to trade that he has in exercising his right to make use of his land. Neither of the rights is absolute, being limited by the correlative rights of others. But neither of them depends on the motive which induced their exercise.

If a defendant, in the alleged exercise of his right to use his land,

¹ These views are, in large part, a reproduction of the language used by Lord Penzance in reference to another topic. See *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744, 755, 756. Cf. 2 Stephen, *Hist. Crim. Law*, 121.

² Erle, *Trade Unions*, 23.

³ See Lord Herschell in *Allen v. Flood*, [1898] A. C. 1, 125, 126; Lord Watson, at 93.

⁴ Pollock, *Torts*, 7 ed., 542, n. x.

⁵ For French and German law to the contrary, see 2 *Journal of Society of Comparative Legislation* (N. S.) 453, 454, 460; Prof. Ames' note in 1 *Ames & Smith, Cas. on Torts*, 750, n. 1; German Civil Code, § 226.

or his right to work at his trade, intentionally causes damage to his neighbor, the question arises whether his right (assuming no bad motive for its exercise) justifies him in inflicting the damage. If that question is answered in the negative, there is then no occasion to consider what effect the presence of bad motive would have. He is liable irrespective of motive. If the above question is answered in the affirmative, then there arises the point we have been discussing; namely, whether the presence of bad motive would destroy his otherwise sufficient justification. Our impression is that it should not have that effect.

Jeremiah Smith.

COLLATERAL ATTACK ON INCORPORATION.

A. DE FACTO CORPORATIONS.

Dedicated to Professor Langdell.

A, B, and C wished to engage in the business of retailing ice. By statute it was provided that if any three persons did specified acts, they acquired the privilege of engaging, as a corporation, in any designated business. A, B, and C, intending in good faith to avail themselves of the provisions of this statute, did all the acts required except one. By inadvertence, no statement of the amount of capital to be employed was made in the certificate of incorporation. Believing that they had received the franchise of the state to act as an artificial person, they assumed, as such person, to engage in the designated business for a number of months. They employed D, and he, while delivering ice and solely by reason of his own negligence, injured E. The alleged corporation has become insolvent, and E seeks to establish that A, B, and C are personally responsible for the tort to him.

"But," say A, B, and C, "although we were not a *de jure* corporation, clearly we were a *de facto* corporation. It is for the state to grant the franchise to be a corporation, and is it not therefore for the state alone to complain if persons usurp that franchise? Is it not well settled that, except as against the state, a *de facto* corporation is just as good as a *de jure* corporation? Has it not been written that the existence of a corporation shall not be attacked collaterally?" It will be the attempt of this article to meet these questions.

The doctrine of *de facto* public officers was established at a comparatively early date. Suppose that a justice of the peace has authority to issue warrants of distress. The law has created the office. A is generally reputed to be entitled to it, and is openly exercising its powers. He issues a warrant, and B, believing that A is a justice of the peace, acts under the warrant and distrains the goods of C. C sues B for the trespass, and shows that A, owing to his failure to take a certain oath, was

not authorized to act as a justice. The courts protect B.¹ It is not to be expected that those who have occasion to deal with a person exercising the powers of a public office shall examine with particularity into all the circumstances affecting his appointment (or election) and qualification, particularly as he is under no duty to disclose the pertinent evidence. If persons dealing with those actually exercising the powers of public offices were held to do so at their peril, the business of the community could not be conducted with reasonable despatch. Moved by these urgent considerations of public policy, the courts have felt themselves justified in giving, for the benefit of a person dealing in good faith with a *de facto* public officer, the same effect to his acts as would be given to the acts of a *de jure* officer.

Is the law of corporations analogous? The owner of land purports to grant it to the M corporation, and M, the alleged corporation, to grant it to A. A brings ejectment against X, a stranger to the title. If M was a *de facto* corporation, A should be allowed to prevail. A large and increasing proportion of business transactions involve the acceptance of a title purporting to pass (or to have passed) from a corporate grantor or vendor. The considerations of public policy moving the courts to facilitate such transactions may not be so urgent as those respecting transactions with public officers, but they have great force. And the courts hold that a *de facto* corporation may be a conduit of title.²

¹ Margate Co. v. Hannam, 3 B. & Ald. 266. See also Leak v. Howel, 2 Cro. Eliz. 533.

² Denver v. Mullen, 7 Colo. 345, 358 (lessees of a *de facto* corporation protected); Duggan v. Colorado Co., 11 Colo. 113 (mortgagee protected); Georgia Co. v. Mercantile Co., 94 Ga. 306 (mortgagee protected); Finch v. Ullman, 105 Mo. 255 (grantee maintained ejectment); Crenshaw v. Ullman, 113 Mo. 633; Lusk v. Riggs, 102 N. W. Rep. 88 (Neb.); Saunders v. Farmer, 62 N. H. 572 (grantee maintained a writ of entry); Hackensack Co. v. DeKay, 36 N. J. Eq. 548, 559 (mortgagee protected); Society Perun v. Cleveland, 43 Oh. St. 481 (grantees protected, although state had maintained *quo warranto* proceedings against the *de facto* corporation).

See also the reasoning of the court in Quinn v. Shields, 62 Ia. 129, 139; Keene v. Van Reuth, 48 Md. 184, 193; East Norway Church v. Froislie, 37 Minn. 447, 450; Elizabethtown Co. v. Green, 49 N. J. Eq. 329, 337; American Co. v. Heidenheimer, 80 Tex. 344, 348; Ricketson v. Galligan, 89 Wis. 394. In Fay v. Noble, 7 Cush. (Mass.) 188, the plaintiff did not ask for relief on this ground.

A fortiori, a court may hold that slight evidence of due incorporation is sufficient to make a *prima facie* case (see note 15). See Hamilton v. McLaughlin, 145 Mass. 20; Tarpey v. Deseret Co., 5 Utah 494.

If the defendant has dealt with the *de facto* corporation (under which plaintiff claims) as a corporation, this precludes him from attacking its existence (see note 33). Farns-

These doctrines do not rest upon any principle of estoppel. There is no basis for any argument addressed *ad hominem*,—the plaintiff who sued because his goods were distrained had never dealt with the alleged justice of the peace, and the defendant who resisted the attempt to eject him had never dealt with the alleged corporation. The doctrines must find their support in considerations of public policy.³

The doctrine of *de facto* public officers is applied only for the benefit of persons dealing with such officers. It is in no wise remedial to the *de facto* officer himself. He cannot enforce a right incident to the office,⁴ and if he assumes to do an act which would be a tort were it not for the protection of the office, he is, notwithstanding that he acted in the best of faith, liable for the tort.⁵

worth v. Drake, 11 Ind. 101; Hasselman v. U. S. Mortgage Co., 97 Ind. 365; Jones v. Hale, 32 Ore. 465; Douglas County v. Bolles, 94 U. S. 104 (a municipal corporation is bound by bonds issued for stock in a *de facto* railroad corporation and sold by the railroad corporation); County of Leavenworth v. Barnes, 94 U. S. 70; Andrews v. National Foundry, 77 Fed. Rep. 774; Toledo Co. v. Continental Trust Co., 95 Fed. Rep. 497. See also Sherwood v. Alvis, 83 Ala. 115; Goodrich v. Reynolds, 31 Ill. 490; Mitchell v. Deeds, 49 Ill. 416; Snyder v. Studebaker, 19 Ind. 462; Brown v. Phillips, 16 Ia. 210; Franklin v. Twogood, 18 Ia. 515, 524; Ragan v. McElroy, 98 Mo. 349; Briar Co. v. Atlas Works, 146 Pa. St. 290; County of Macon v. Shores, 97 U. S. 272; Close v. Greenwood Cemetery, 107 U. S. 466; Beekman v. Hudson River Co., 135 Fed. Rep. 3.

A fortiori, the fact of such dealing may properly be held to make a *prima facie* case of incorporation. See Williams v. Cheney, 3 Gray (Mass.) 215; Topping v. Bickford, 4 Allen (Mass.) 120; Den v. Van Houten, 10 N. J. L. 270; Ryan v. Martin, 91 N. C. 464. Cf. Hungerford Bank v. Van Nostrand, 106 Mass. 559.

On the question of good faith, see note 13. The grantee from a *de facto* corporation should be protected, if he has acted in good faith, even though the attempt to form the corporation was not made in good faith. Duggan v. Colorado Co., 11 Colo. 113, 117; Elizabethtown Co. v. Green, 49 N. J. Eq. 329, 337. Cf. Doyle v. Mizner, 40 Mich. 160. And it is submitted that the courts should refuse to inquire whether persons asserting a title derived from a *de facto* corporation had notice of the defective organization at the time of their purchase, and that therefore a *de facto* corporation should be held to have a marketable title. It was so held in Lancaster v. Amsterdam Co., 140 N. Y. 576, 583. (It may also be noted that the courts will protect the grantee of a corporation, even though the acquisition of the land by the corporation was *ultra vires*, and the grantee is charged with constructive notice of the powers of the corporation.) Where the sole question before the court is as to the capacity of an alleged corporation to be a conduit of title, a wide scope may very properly be given to the *de facto* doctrine.

³ Consideration is omitted of the questions, (a) whether the *de facto* doctrine is available to the state in criminal prosecutions, and (b) whether collateral attack may ever be made upon the existence of a *de facto* municipal corporation.

⁴ Dolan v. New York, 68 N. Y. 274.

⁵ Short v. Symmes, 150 Mass. 298.

The question therefore becomes this: is there any doctrine of *de facto* corporations (where there is no basis for the argument *ad hominem*) which goes beyond the analogy of the doctrine of *de facto* public officers, and is remedial to the associates themselves?

Some rights may be lawfully acquired forthwith by mere appropriation. Thus in the case of wild animals, of abandoned chattels, of land made vacant by the death of a tenant *pur autre vie*. But no court has ever held, or intimated, that the franchise to be a corporation may be lawfully acquired forthwith by mere appropriation.

Many rights may be lawfully acquired by appropriation continued for a considerable lapse of time, under the operation of statutes of limitation, or by force of analogies from such statutes, or by force of artificial presumptions of a lost grant. The franchise to be a corporation may be thus lawfully acquired.⁶

If A is in the actual possession of property belonging to X, then, even though A obtained such possession wrongfully, B, who has himself no right to the property, must not disturb A's possession. Such a rule works no injustice to B, and tends to preserve the public peace.

But does the law ever permit A, who has usurped a right, to require B, an innocent stranger, to submit to an affirmative assertion of such right against him? The propositions of the preceding three paragraphs are no authority for such a doctrine.

A deed is placed in escrow to be delivered to A when A executes a bond to support B. A never executes a bond, but he in fact supports B and assumes in good faith to act as owner of the property. He does not thereby acquire title.⁷

A father leaves a child with a charitable institution. The institution has a statutory right, upon the performance of specified acts, to apprentice the child. Most, but not all, of the specified acts are performed, and the institution assumes to apprentice the child to the defendant, who believes he has become its master. If the father wishes to resume the support of the child, it is difficult to see how the "*de facto* master" can successfully resist him.⁸

⁶ *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319, 326; *King v. Beardwell*, 2 Keb. 52; *Crafts of Mercers v. Hart*, 1 C. & P. 113. See also *State v. Bailey*, 19 Ind. 452.

⁷ See *Hinman v. Booth*, 21 Wend. (N. Y.) 267.

⁸ The case put in the text was suggested by *People v. Weissenbach*, 60 N. Y. 385. It was there held that the failure of the respondent to give a bond might give the child

A and B went through a ceremony which they believed to constitute them man and wife. But the person assuming to officiate had no power to marry and (under the laws of the state where the ceremony was performed) no legal marriage was effected. A sues C for alienating the affections of B, his wife. If C had alienated the affections of B, A may well, in some proper form, be given redress against him. But how can a man, who has not been married, maintain an action for alienating the affections of his wife?

A dies. B assumes, without right, to act as his executor. Creditors of A may take him at his assertion; debtors of A, paying him in good faith, may perhaps be protected; but B himself cannot maintain an action to enforce any right belonging to the estate.⁹

We have already seen that a *de facto* public officer cannot maintain an action to enforce a right incident to the office, or avail himself of the protection of the office against liability for a tort.¹⁰

Possibly a disseisor was allowed affirmatively to assert rights incident to the ownership of the land, but this is not clear. In any event, the conditions of society are now so different from those prevailing when the doctrine of disseisin was established and developed that, it is submitted, the reasons for doctrines remedial to disseisors have ceased to exist, except so far as they involve the policy of quieting titles after a lapse of time. Analogies from the old law of disseisin would be as unsafe as analogies from the old law of tortious conveyances. It may, moreover, be added that the doctrine of disseisin itself seems to have been established primarily for the benefit of the lord, and not for the benefit of the disseisor.

If A has made an expenditure in good faith, believing that he was thereby obtaining a legal right, and he did not obtain the right, it may well be that he is a proper object of sympathy. But is this sympathy to be carried to the extent of forcing B, himself quite innocent of any wrong-doing, to submit to an exercise of this right by A? What end of justice is thereby achieved? If A has a certain right, he is not responsible for damage done to E; if he does not have it, he is responsible. How can he be said to have acquired the right, when he has not performed the conditions

a right to avoid the indentures, but that the father could not take advantage of this right in the child. See note 12.

⁹ 1 Williams, Executors, 10 ed., 695.

¹⁰ See notes 4 and 5.

precedent to its acquisition, but has merely performed most of these conditions, and acted upon the mistaken belief that he had performed all? Is he to be allowed to lift himself by his own boot-straps? It is fundamental that, while an equity may be swept away for the benefit of a person who has made an expenditure in good faith, a legal gap will not be bridged.

If then (to return to the case put in the opening paragraph) A, B, and C are allowed to protect themselves from personal liability for the tort done to E, on the ground that, in appointing D as agent, they were exercising a right obtained from the state to act as an artificial person, this must rest upon some doctrine peculiar to the law of corporations.

Courts have frequently used the expression that the existence of a corporation cannot be attacked collaterally. Suppose the legislature grants a charter to the X corporation, and provides therein that in case a certain act is not done within a time specified the charter shall be void. The act is not done within the time specified, and thereafter X sues A. A seeks to defend on the ground that X, by its failure to do the act, ceased to be a corporation. But, although the word "void" was used, the courts would ordinarily construe this to mean "voidable, at the election of the state."¹¹ If such construction is adopted, it follows that, until the state has exercised its option to declare the charter void, X still lives. A does not represent the state, and cannot enforce the state's option. It is well settled, therefore, that no collateral attack can be made upon the existence of a corporation by reason of facts justifying the state in declaring the corporate life forfeited.¹²

¹¹ *Brown v. Wyandotte Co.*, 68 Ark. 134; *Atchafalaya Bank v. Dawson*, 13 La. 497; *Matter of New York Co.*, 148 N. Y. 540. Cf. *Brooklyn Co. v. Brooklyn*, 78 N. Y. 524.

¹² *Harris v. Nesbit*, 24 Ala. 398; *Bloch v. O'Conner Co.*, 129 Ala. 528; *Hammett v. Little Rock Co.*, 20 Ark. 204; *Mississippi Co. v. Cross*, 20 Ark. 443; *West v. Carolina Co.*, 31 Ark. 476; *Searcy v. Yarnell*, 47 Ark. 269; *Union Co. v. Rocky Mountain Bank*, 1 Colo. 531; *Spencer v. Champion*, 9 Conn. 536, 543; *Kellogg v. Union Co.*, 12 Conn. 7; *Pearce v. Olney*, 20 Conn. 544, 556; *Pahquioque Bank v. Bank of Bethel*, 36 Conn. 325; *Young v. Harrison*, 6 Ga. 130; *Union Branch Co. v. East Tennessee Co.*, 14 Ga. 327; *Atlanta v. Gate City Co.*, 71 Ga. 106; *Wilmans v. Bank of Illinois*, 6 Ill. 667; *Thomas v. South Side Co.*, 218 Ill. 571; *John v. Farmers' Bank*, 2 Blackf. (Ind.) 367; *Brookville Co. v. McCarty*, 8 Ind. 392; *Logan v. Vernon Co.*, 90 Ind. 552; *Barren Creek Co. v. Beck*, 99 Ind. 247; *Carey v. Cincinnati Co.*, 5 Ia. 357; *Bank of Gallipolis v. Trimble*, 6 B. Mon. (Ky.) 599; *Atchafalaya Bank v. Dawson*, 13 La. 497; *State v. Fagan*, 22 La. Ann. 545; *Penobscot Corporation v. Lamson*, 16 Me. 224; *Hamilton v. Annapolis Co.*, 1 Md. Ch. 107; *University of Maryland v. Williams*, 9 Gill

But this doctrine has, save by confusion, nothing to do with the doctrine of *de facto* corporations. It is concerned not with the manner in which corporate life may be gained, but with the manner in which corporate life may be lost. There is no defect whatever in the formation of the corporation; no one questions but

& J. (Md.) 365; *Planters' Bank v. Bank of Alexandria*, 10 Gill & J. (Md.) 346; *Musgrave v. Morrison*, 54 Md. 161; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344, 371; *Cahill v. Kalamazoo Co.*, 2 Doug. (Mich.) 124; *Montgomery v. Merrill*, 18 Mich. 338; *Toledo Co. v. Johnson*, 49 Mich. 148; *Bohannon v. Binns*, 31 Miss. 355; *Bank of Missouri v. Merchants' Bank*, 10 Mo. 123; *Bank of Missouri v. Snelling*, 35 Mo. 190; *State v. Carr*, 5 N. H. 367, 370; *Peirce v. Somersworth*, 10 N. H. 369; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *New Jersey Co. v. Long Branch Commissioners*, 39 N. J. L. 28; *Jersey City Co. v. Consumers Gas Co.*, 40 N. J. Eq. 427; *Elizabethtown Co. v. Green*, 46 N. J. Eq. 118; *West Jersey Co. v. Camden Co.*, 52 N. J. Eq. 452, 464; *Merrick v. Van Santvoord*, 34 N. Y. 208, 222; *Matter of N. Y. Elevated Co.*, 70 N. Y. 327; *Matter of Kings County Elevated Co.*, 105 N. Y. 97; *Matter of Cutchogue*, 131 N. Y. 1 (see also 46 Barb. (N. Y.) 361; 6 Cow. (N. Y.) 23; 5 Duer (N. Y.) 676; 7 How. Pr. (N. Y.) 476; 4 N. Y. Supp. 177; 3 Sandf. Ch. (N. Y.) 625, 652; 23 Wend. (N. Y.) 254. Cf. 19 Johns. (N. Y.) 456; *Webb v. Moler*, 8 Oh. 548; *Irvine v. Lumbermen's Bank*, 2 Watts & S. (Pa.) 190; *Coil v. Pittsburgh College*, 40 Pa. St. 439; *Twelfth-St. Co. v. Philadelphia Co.*, 142 Pa. St. 580, 593; *Hinchman v. Philadelphia Road*, 160 Pa. St. 150; *Gas Co. v. Downingtown*, 193 Pa. St. 255; *Olyphant Co. v. Olyphant*, 196 Pa. St. 553; *Windsor Co. v. Carnegie Co.*, 204 Pa. St. 459; *LaGrange Co. v. Rainey*, 7 Cold. (Tenn.) 420; *Anderson v. Railroad*, 91 Tenn. 44; *Connecticut Co. v. Bailey*, 24 Vt. 465; *Crump v. U. S. Co.*, 7 Grat. (Va.) 352; *Moore v. Schoppert*, 22 W. Va. 282; *Lumber Co. v. Ward*, 30 W. Va. 43; *Mackall v. Chesapeake Co.*, 94 U. S. 308; *Van Wyck v. Knevals*, 106 U. S. 360 (see also 28 Fed. Cas. 1153; 5 Sawy. (U. S.) 44); *Robinson v. London Hospital*, 10 Hare 19.

A private individual cannot institute *quo warranto* proceedings to have the charter of a corporation declared forfeited. *North v. State*, 107 Ind. 356; *Commonwealth v. Union Co.*, 5 Mass. 230; *Attorney General v. Adonai Corporation*, 167 Mass. 424; *State v. Paterson Co.*, 21 N. J. L. 9; *Commonwealth v. Farmers' Bank*, 2 Grant (Pa.) 392; *Western Pa. Company's Appeal*, 104 Pa. St. 399.

If the legislature is induced by fraud to pass a special act of incorporation, the corporation comes into being, and the fraud is only a cause of forfeiture by the state. *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344, 370. Similarly, if the legislature has by a special or general law authorized a designated official or body to issue a charter or a certificate (which is made conclusive evidence of incorporation) upon the performance of conditions precedent, and the official or body is induced by fraud to issue such charter or certificate. *Rice v. Bank of Commonwealth*, 126 Mass. 300 (by Mass. L. 1903, c. 437, § 12, the certificate of the Secretary of State "shall have the force and effect of a special charter"); *Nat'l Bank v. Rockefeller*, 195 Mo. 15, 42 (whether this was a sound construction of the statute in question, *quære*); *Centre Co. v. McConaby*, 16 Serg. & R. (Pa.) 140, 1 Pen. & W. (Pa.) 426, 431; *Travaglini v. Societa Italiana*, 5 Pa. Dist. 441; *German Insurance Co. v. Strahl*, 13 Phila. 512. See also *Pattison v. Albany Ass'n*, 63 Ga. 373; *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537; *Wells Co. v. Gastonia Co.*, 198 U. S. 177, 185; *Pilbrow v. Pilbrow's Co.*, 5 C. B. 440, 471, 472 (commenting on § 18 of the Companies Act of 1862). Similarly, if the designated official or body is induced by fraud to do an act the performance of which is one of the conditions precedent to incorporation. *Duke v.*

that it came into existence; the only question is whether it still continues in existence. The use of this doctrine to support the contention that, if certain persons assume to have the right to act as a corporation, all but the state must submit quietly to their exercise of such usurped right, arises, it is not too much to say, from a profound misconception.

Have I exposed myself to the retort courteous? Perhaps the misconception is in supposing that any one does, deliberately,

Cahawba Co., 16 Ala. 372; Litchfield Bank v. Church, 29 Conn. 137, 148; Jones v. Dana, 24 Barb. (N. Y.) 395; Tar River Co. v. Neal, 3 Hawks (N. C.) 520.

Wherever the legislature has authorized the formation of a corporation upon the performance of certain conditions precedent, the courts must necessarily determine whether the legislature intended to require a certain mental state in the incorporators as one of these conditions. Considering the difficulty of proof on such a point, the courts may well incline against such a construction of the law. Thus if the legislature has authorized persons to form a corporation by filing a certain certificate, and the certificate filed contains the required matter and the statements therein are true, a corporation is formed, even though the incorporators secretly intend to make an unlawful use of the corporation so formed. See *Importing Co. v. Locke*, 50 Ala. 332, 334; *Niemeyer v. Little Rock Ry.*, 43 Ark. 111, 120; *Aurora Co. v. Lawrenceburgh*, 56 Ind. 80, 87; *Lincoln Ass'n v. Graham*, 7 Neb. 173; *Attorney General v. Stevens*, Saxt. Ch. (N. J.) 369, 378; *National Docks Co. v. Central Railroad*, 32 N. J. Eq. 755, 759; *Attorney General v. American Tobacco Co.*, 55 N. J. Eq. 352, 369; aff. 56 N. J. Eq. 847; *Buffalo Co. v. Hatch*, 20 N. Y. 157, 159; *Windsor Co. v. Carnegie Co.*, 204 Pa. St. 459, and cases cited. See also *Terhune v. Midland Co.*, 38 N. J. Eq. 423; *Wellington Co. v. Cashie Co.*, 114 N. C. 690; *Cochran v. Arnold*, 58 Pa. St. 399, 405. Cf. cases cited below. On the formation of a corporation and transfer of property thereto with intent to give the federal courts jurisdiction, see *Irvine Co. v. Bond*, 74 Fed. Rep. 849.

Although fraud in procuring a charter is only a cause of forfeiture, fraud by the associates may prevent incorporation. Thus (to put a plain case) where the legislature requires, as a condition precedent, that a certain subscription be made "in good faith." Whether, when fraud prevents incorporation, collateral attack will be permitted upon the existence of the alleged corporation is not a question within the law of *de facto* corporations (see third paragraph of note 13). But there is no sweeping rule that such attack may never be made. *Christian Co. v. Fruitdale Co.*, 121 Ala. 340; *Carey v. Cincinnati Co.*, 5 Ia. 357; *Montgomery v. Forbes*, 148 Mass. 249; *Cleaton v. Emery*, 49 Mo. App. 345; *Davidson v. Hobson*, 59 Mo. App. 130; *Farnham v. Benedict*, 107 N. Y. 159, 169; *Booth v. Wonderly*, 36 N. J. L. 250; *Hill v. Beach*, 12 N. J. Eq. 31; *Jersey City Co. v. Dwight*, 29 N. J. Eq. 242 (the learned vice-chancellor who decided this case assumed, 46 N. J. Eq. 116, that it could not stand with *National Docks Co. v. Central Co.*, 32 N. J. Eq. 755. But see 49 N. J. Eq. 329, 335); *Elizabethtown Co. v. Green*, 49 N. J. Eq. 329 (by the five dissenting judges. Whether the majority was opposed on this point does not appear. The decision is explained in 52 N. J. Eq. 111, 144, on a ground consistent with this opinion by the dissenting judges); *Brundred v. Rice*, 49 Oh. St. 640; *Chicora Co. v. Crews*, 6 S. C. 243, 275; *McGrew v. City Produce Exchange*, 85 Tenn. 572; *Le Warne v. Meyer*, 38 Fed. Rep. 191. See also *Salomon v. Broderip*, [1897] A. C. 22, 43. Cf. *Laffin Co. v. Sinsheimer*, 46 Md. 315; *Gow v. Collin Co.*, 109 Mich. 45; *Cochran v. Arnold*, 58 Pa. St. 399, 405.

contend that the existence of an alleged corporation can never be attacked collaterally. Assume the contention to be that the existence of an alleged corporation cannot be attacked collaterally, if the assumption of the right to be a corporation is made under peculiarly extenuating circumstances. Assume further that these extenuating circumstances are: (1) that an attempt to incorporate has been made resulting in a colorable corporate organization; (2) that there was a law authorizing the formation of such a corporation as was attempted; (3) that there has been user of some of the powers which such a corporation would possess; and (4) that the persons seeking to prevent collateral attack acted in good faith.¹³ Under such circumstances, why should not the courts

¹³ If the state grants to certain persons the privilege of acting as an artificial person, they are a corporation *de jure*. Whenever persons assume to act as an artificial person, without the authority of the state, it might properly be said that they are a corporation *de facto*. Sheer usurpation of the corporate privilege is a fact, no less than usurpation under extenuating circumstances. If this broad conception of a *de facto* corporation had been taken, then the subject of *de facto* corporations would have covered the whole subject of the usurpation of corporate power.

But it is clear that it has not been taken. Thus, persons who have been granted the privilege to act as an artificial person for some purposes may assume so to act for other purposes. When they leap the bounds of the privilege granted them, their act is a usurpation of corporate power. But the law of *ultra vires* transactions is not treated by the courts as a branch of the law of *de facto* corporations.

Similarly, even where the associates have not been granted the corporate privilege for any purpose, the courts have, in analogy to the law of *de facto* officers, and by a usage now altogether too well established to be profitably questioned, confined the conception of a *de facto* corporation within the bounds stated in the text. If associates usurp the corporate privilege when there is no law authorizing such a corporation as they assert themselves to be, collateral attack may or may not be allowed on the existence of the alleged corporation, but the law of *de facto* corporations does not control. Similarly, where the associates have not even a colorable organization, or where persons who have not acted in good faith seek to prevent the collateral attack. These cases form a branch of the law on the usurpation of corporate power, but not of the law on *de facto* corporations. This article deals only with *de facto* corporations in the narrow sense established by usage,—usurpation of corporate power under the peculiarly extenuating circumstances stated in the text.

To speak of these circumstances in detail.

1. *The attempt to incorporate must have gone so far as to result in a colorable corporate organization.* McLennan v. Hopkins, 2 Kan. App. 260; Johnson v. Corser, 34 Minn. 355 (see 52 Minn. 243); Abbott v. Omaha Co., 4 Neb. 416; McLeary v. Dawson, 87 Tex. 524, 538 ("a self-constituted body which was not even a *de facto* corporation"); Bergeron v. Hobbs, 96 Wis. 641. But *cf.* the language of the court in Methodist Church v. Pickett, 19 N. Y. 482, 485.

2. *There must have been a law authorizing the formation of such a corporation as was attempted.* Duke v. Taylor, 37 Fla. 64; American Co. v. Minnesota Co., 157 Ill. 641; Snyder v. Studebaker, 19 Ind. 462; Eaton v. Walker, 76 Mich. 579; Bradley v. Rep-pell, 133 Mo. 545; St. Louis Ass'n v. Hennessy, 11 Mo. App. 555; Evenson v. Elling-

refuse to allow any one but the state to call attention to any slip that was made in the attempt to form the corporation? At first blush the doctrine seems harmless and commendable, — to be

son, 67 Wis. 634; Davis v. Stevens, 104 Fed. Rep. 235. Cf. Smith v. Sheeley, 12 Wall. (U. S.) 358.

If there is a law authorizing the formation of such a corporation, it is not fatal that the attempt to incorporate was under a different law. Georgia Co. v. Mercantile Co., 94 Ga. 306. Cf. Welch v. Old Dominion Co., 10 N. Y. Supp. 174.

A *de jure* corporation may be formed under a law passed by a *de facto* legislature. U. S. v. Insurance Companies, 22 Wall. (U. S.) 99.

3. *There must have been user of some of the powers which such a corporation would possess.* Without user there would be no assumption of corporate power. See Emery v. De Peyster, 77 N. Y. App. Div. 65, 67; Elgin Co. v. Loveland, 132 Fed. Rep. 41, 45.

4. *The persons seeking to prevent collateral attack must have acted in good faith.* In defining the limits of the *de facto* doctrine, the courts have sometimes made no express mention of good faith. Owensboro Co. v. Bliss, 132 Ala. 253; Baker v. Neff, 73 Ind. 68; Doty v. Patterson, 155 Ind. 60, 64; Finnegan v. Noerenberg, 52 Minn. 239; Gibbs' Estate, 157 Pa. St. 59, 69; Toledo Co. v. Continental Trust Co., 95 Fed. Rep. 497, 508. But in these cases no contention was made that the associates had not acted in good faith.

Express mention of good faith is usual. Duggan v. Colorado Co., 11 Colo. 113; American Co. v. Minnesota Co., 157 Ill. 641, 652; Stanwood v. Sterling Co., 107 Ill. App. 569; Williamson v. Kokomo Ass'n, 89 Ind. 389; Hasselman v. U. S. Mortgage Co., 97 Ind. 365; Haas v. Bank of Commerce, 41 Neb. 754; Vanneman v. Young, 52 N. J. L. 403; Elizabethtown Co. v. Green, 49 N. J. Eq. 329, 338; Hagerman v. Ohio Ass'n, 25 Oh. St. 186, 200; Society Perun v. Cleveland, 43 Oh. St. 481; Marsh v. Mathias, 19 Utah 350; Gilkey v. How, 105 Wis. 41, 45; Tulare District v. Shepard, 185 U. S. 1, 16.

If the attempt at incorporation is not made in good faith, but persons purchase the alleged stock in good faith, they should not be held personally liable to those who have contracted with the corporation. American Co. v. Heidenheimer, 80 Tex. 344 (see note 33). In Minor v. Mechanics Bank, 1 Pet. (U. S.) 46, 66, Story, J., said: "It would be extremely difficult to maintain, upon general principles of law, that a private fraud, between the original subscribers and commissioners, could be permitted to be set up, to the injury of subsequent purchasers of the stock, who became *bona fide* holders, without any participation or notice of the fraud."

Ordinarily, the same result will be reached whether good faith is required in those who attempted incorporation or in those who now seek to prevent collateral attack upon incorporation. But it is submitted that American Co. v. Heidenheimer is a decision within the limits of the *de facto* doctrine, and that therefore the requirement as to good faith may properly be stated in the form used in the text.

The doctrine of *de facto* corporations usually arises where there has been an attempt to incorporate under a general law. But it is not confined to such cases. The legislature might by special act grant a charter which was to take effect upon the performance of certain conditions precedent. Such charter, it is submitted, would supply the place of the first and second requirements stated in the text. See Lucas v. Bank of Georgia, 2 Stew. (Ala.) 147; Gaines v. Bank of Mississippi, 12 Ark. 769; Middlesex Husbandmen v. Davis, 3 Met. (Mass.) 133; Utica Co. v. Tilman, 1 Wend. (N. Y.) 555; Turnpike Co. v. McCarsion, 1 Dev. & B. (N. C.) 306; Searsburgh Co. v. Cutler, 6 Vt. 315, 322; Bank of Manchester v. Allen, 11 Vt. 302.

intended merely to save examination into all the details of the formation of corporations.¹⁴

In answer. In the first place, it is to be noted that, if the existence of a corporation is only collaterally in issue, it is well settled that proof of facts sufficient to satisfy the requirements of the *de facto* doctrine is sufficient to make a *prima facie* case.¹⁵ In

¹⁴ It would be easy to accumulate dicta in support of such a doctrine. See, for example, *Doty v. Patterson*, 155 Ind. 60, 64 (but *cf.* the decisions in *Busenback v. Attica Co.*, 43 Ind. 265; *Indianapolis Co. v. Herkimer*, 46 Ind. 142); *Buffalo Co. v. Cary*, 26 N. Y. 75, 77 (but *cf.* the decisions in *Dorris v. Sweeney*, 60 N. Y. 463, 467; *N. Y. Cable Co. v. N. Y.*, 104 N. Y. 1, 43); *Cochran v. Arnold*, 58 Pa. St. 399, 405 (but *cf.* the decision in *Guckert v. Hacke*, 159 Pa. St. 303); *Gilkey v. How*, 105 Wis. 41, 46 (but *cf.* the decision in *Slocum v. Head*, 105 Wis. 431); *New Orleans Co. v. Louisiana*, 180 U. S. 320, 328 (but *cf.* the more restrained language by the same learned justice in *Tulare District v. Shepard*, 185 U. S. 1, 14, 17).

In New Jersey it has been laid down that equity will not, at the instance of a private individual, enjoin a *de facto* corporation from the exercise of powers which it would possess if a *de jure* corporation. *Elizabethtown Co. v. Green*, 49 N. J. Eq. 329, 331, 332. Equity is no doubt loath to determine questions as to the legal formation of corporations (*cf.* the determination of questions as to the title of real estate); and, moreover, should not entertain a bill by a private individual which is, in substance, a *quo warranto* proceeding (see second paragraph of note 12). But equity has jurisdiction to determine whether a corporation has been legally formed. The question was determined in the early case of *Hill v. Beach*, 12 N. J. Eq. 31, and again in *Union Water Co. v. Kean*, 52 N. J. Eq. 111, 122, where Pitney, V. C., upholds the jurisdiction in an elaborate opinion. (*Cf.* the language of the court in *National Docks Co. v. Central Railroad Co.*, 32 N. J. Eq. 755; *West Jersey Co. v. Cape May Co.*, 34 N. J. Eq. 164; *Terhune v. Midland Co.*, 38 N. J. Eq. 423; *Attorney-General v. American Tobacco Co.*, 55 N. J. Eq. 352, 368; *aff.* 56 N. J. Eq. 847; *Cumberland Co. v. Clinton Co.*, 64 N. J. Eq. 521, 523.) And a bill to restrain the assertion of a corporate right directly against complainant will not ordinarily be in substance a *quo warranto* proceeding. It might as well be argued that the plea of *null tiel* corporation may never be permitted at law, because it is, *pro tanto*, a *quo warranto* proceeding.

Now, *Hampton v. Clinton Co.*, 65 N. J. L. 158 (see note 28) shows that at law there is no sweeping rule against collateral attack. See also *Trenton Co. v. United Co.*, 60 N. J. Eq. 500. Is the New Jersey law that, if a *de facto* corporation institutes proceedings to take A's land by eminent domain, he may successfully resist such proceedings, but that, even if immediate irreparable injury is being threatened, he may not resort to equity for an injunction? It is submitted that *National Docks Co. v. Central Co.*, 32 N. J. Eq. 755, does not necessitate such a decision (see fourth paragraph of note 12).

See also *Denver Co. v. Denver Co.*, 2 Colo. 673; *Independent Order Foresters v. United Order*, 94 Wis. 234, 241.

¹⁵ *Lucas v. Bank of Georgia*, 2 Stew. (Ala.) 147; *Gaines v. Bank of Mississippi*, 12 Ark. 769; *Memphis Co. v. Rives*, 21 Ark. 302; *Mix v. Bank of Bloomington*, 91 Ill. 20; *Eakright v. Logansport Co.*, 13 Ind. 404; *Middlesex Husbandmen v. Davis*, 3 Met. (Mass.) 133; *Barrett v. Mead*, 10 Allen (Mass.) 337; *Merchants' Bank v. Glendon Co.*, 120 Mass. 97; *Utica Co. v. Tilman*, 1 Wend. (N. Y.) 555; *Eaton v. Aspinwall*, 19 N. Y. 119, 121; *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537, 543; *Turnpike Co. v. McC Carson*, 1 Dev. & B. (N. C.) 306; *Searsburgh Co. v. Cutler*, 6 Vt. 315, 322; *Bank of Manchester v. Allen*, 11 Vt. 302.

the second place, it is to be noted that most failures to conform strictly to statutory provisions are not fatal to the formation of the corporation. (a) If a provision of the statute has not been exactly followed, the court may hold that there has been substantial compliance.¹⁶ (b) If some provision of the statute has not been followed at all, the court may hold such provision to be merely directory.¹⁷ (c) If some mandatory provision has not been followed at all, the court may nevertheless hold that performance of the acts specified in such provision was not intended to be a condition precedent to the existence of the corporation, — that non-performance was intended at most to be a ground for declaring the corporate existence forfeited.¹⁸ In all these cases the associates gain authority to act as a corporation.

See also *Willard v. Trustees*, 66 Ill. 55; *Peoria Co. v. Peoria Co.*, 105 Ill. 110; *Cozzens v. Chicago Co.*, 166 Ill. 213; *Hager's Town Co. v. Creeger*, 5 Har. & J. (Md.) 122; *Bartlett v. Wilbur*, 53 Md. 485, 498; *Narragansett Bank v. Atlantic Silk Co.*, 3 Met. (Mass.) 282; *Packard v. Old Colony Co.*, 168 Mass. 92; *Canal Co. v. Paas*, 95 Mich. 372; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 539; *Wood v. Jefferson Bank*, 9 Cow. (N. Y.) 194; *Bank of Toledo v. International Bank*, 21 N. Y. 542; *Williamsburgh Bank v. Solon*, 136 N. Y. 465, 475; *Augusta Co. v. Vertrees*, 4 Lea (Tenn.) 75; *Reynolds v. Myers*, 51 Vt. 444.

¹⁶ *Van Pelt v. Home Ass'n*, 79 Ga. 439; *Eakright v. Logansport Co.*, 13 Ind. 404; *Thornton v. Balcom*, 85 Ia. 198; *Seaton v. Grimm*, 110 Ia. 145; *Buffalo Co. v. Hatch*, 20 N. Y. 157, 160; *Ogdensburgh Co. v. Frost*, 21 Barb. (N. Y.) 541; *Thompson v. N. Y. Co.*, 3 Sandf. Ch. (N. Y.) 625, 652; *Carpenter v. Frazier*, 102 Tenn. 462; *Rogers v. Danby Society*, 19 Vt. 187, 191.

¹⁷ *Judah v. American Co.*, 4 Ind. 333; *McClinch v. Sturgis*, 72 Me. 288, 296; *Newcomb v. Reed*, 12 Allen (Mass.) 362; *Braintree Co. v. Braintree*, 146 Mass. 482, 488; *Mead v. Keeler*, 24 Barb. (N. Y.) 20, 25; *Rassbeck v. Desterreicher*, 55 How. Pr. (N. Y.) 516; *Ossipee Co. v. Canney*, 54 N. H. 295, 312; *Grays v. Turnpike Co.*, 4 Rand. (Va.) 578, 581. See also *Cross v. Pinckneyville Co.*, 17 Ill. 54; *Busenback v. Attica Co.*, 43 Ind. 265, criticizing *Eakright v. Logansport Co.*, 13 Ind. 404. On whether the state may take advantage of failure to follow a directory provision, see *Rose Hill Co. v. People*, 115 Ill. 133; *Jackson v. Crown Co.*, 21 Utah 1. Cf. *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64, 80.

¹⁸ *Sparks v. Woodstock Co.*, 87 Ala. 294; *Brown v. Wyandotte Co.*, 68 Ark. 134, 140; *Mitchell v. Rome Co.*, 17 Ga. 574; *Boise City Co. v. Pinkham*, 1 Idaho 790; *Chiniquy v. Bishop of Chicago*, 41 Ill. 148 (a corporation sole); *Walton v. Riley*, 85 Ky. 413 (overruling 81 Ky. 300); *Portland Co. v. Bobb*, 88 Ky. 226; *South Bay Co. v. Gray*, 30 Me. 547; *Lord v. Essex Ass'n*, 37 Md. 320, 326; *Hammond v. Straus*, 53 Md. 1, 14; *Merrick v. Reynolds Co.*, 101 Mass. 381; *Hawes v. Anglo-Saxon Co.*, 101 Mass. 385, 395; *McGinty v. Athol Co.*, 155 Mass. 183, 185; *Narragansett Bank v. Atlantic Co.*, 3 Met. (Mass.) 282, 288; *Boston Co. v. Moring*, 15 Gray (Mass.) 211; *Shakopee Co.*, 37 Minn. 91; *Granby Co. v. Richards*, 95 Mo. 106; *St. Joseph Co. v. Shambaugh*, 106 Mo. 557, 567; *Vanneman v. Young*, 52 N. J. L. 403; *Plank Road Co. v. Chamberlain*, 32 N. Y. 651, 655; *Society of Cutchogue*, 131 N. Y. (also 41 Barb. (N. Y.) 568; 1 Sandf. (N. Y.) 158, 168); *Hughesdale Co. v. Vanner*, 12 R. I. 491; *Cheraw Co. v. White*, 14 S. C. 51; *Harrod v. Hamer*, 32 Wis. 162; *Minor v. Mechanics'*

We are dealing, therefore, only with a case where the court, on a sound construction of the statutes, finds the intent of the legislature to have been that performance of a certain act should be a condition precedent to incorporation.¹⁹ The legislature might, indeed, have authorized the formation of two kinds of corporations, one good against the world, and one good against all but the state. But such statutes are rare.²⁰ The legislature has authorized the formation only of a corporation good against the world. It has declared that a certain act shall be performed before any such corporation shall come into existence. The act has not been performed. Is it proper, notwithstanding, for the court to allow the assertion of rights dependent upon incorporation?

It is not for the court to create a corporation. The franchise to

Bank, 1 Pet. (U. S.) 46, 65; Wells Co. v. Gastonia Co., 198 U. S. 177; Young Co. v. Young Co., 72 Fed. Rep. 62; Ryland v. Hollinger, 117 Fed. Rep. 216. See also Southern Bank v. Williams, 25 Ga. 534; Hastings v. Amherst Co., 9 Cush. (Mass.) 596, 600; Quincy Canal v. Newcomb, 7 Met. (Mass.) 276, 282; Raegener v. Hubbard, 167 N. Y. 301, 306; Waterford Co. v. Dalbiac, 6 Exch. 443.

¹⁹ For instances of such construction see Allman v. Havana Co., 88 Ill. 521, 526; Loverin v. McLaughlin, 161 Ill. 417, 425; McIntire v. McLain Ass'n, 40 Ind. 104; Kaiser v. Lawrence Bank, 56 Ia. 104; Field v. Cooks, 16 La Ann. 153; Utley v. Union Co., 11 Gray (Mass.) 139, 141; Jersey City Co. v. Dwight, 29 N. J. Eq. 242, 247; Crocker v. Crane, 21 Wend. (N. Y.) 211; People v. Nelson, 46 N. Y. 477, 480; N. Y. Co. v. N. Y., 104 N. Y. 1, 43; Card v. Moore, 68 N. Y. App. Div. 327, 331; aff. 173 N. Y. 598; Guckert v. Hacke, 159 Pa. St. 303; Bergeron v. Hobbs, 96 Wis. 641; Elgin Co. v. Loveland, 132 Fed. Rep. 41, 45.

²⁰ In California, § 6 of Laws of 1850, c. 128, as amended by Laws of 1862, c. 124, provided: "The question of the due incorporation of any company, claiming in good faith to be a corporation under the laws of this state and doing business as such corporation, or of its right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such *de facto* corporation may be a party." This was substantially reenacted as § 358 of the Civil Code. For decisions since the enactment of this statute, see 22 Cal. 434; 26 *ibid.* 286; 37 *ibid.* 354; 37 *ibid.* 538; 51 *ibid.* 406; 55 *ibid.* 98; 67 *ibid.* 526; 70 *ibid.* 163; 72 *ibid.* 379; 80 *ibid.* 181; 82 *ibid.* 184; 90 *ibid.* 22; 97 *ibid.* 276; 100 *ibid.* 87; 102 *ibid.* 55; 103 *ibid.* 506; 104 *ibid.* 334; 126 *ibid.* 541; 128 *ibid.* 136; 130 *ibid.* 27; 137 *ibid.* 441; 141 *ibid.* 713; 4 Sawy. (U. S.) 133; 46 Fed. Rep. 709. See also § 2892, Comp. L. Dakota, cited in Davis v. Stevens, 104 Fed. Rep. 235, and Code of Georgia (1895), § 1862, and 108 Ga. 345; 109 *ibid.* 666; 121 *ibid.* 513.

The Code of Iowa (1897), § 1636, which substantially reenacts the provision first adopted in § 704 of the Code of 1851, provides: "No person or persons acting as a corporation shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with such an acting corporation, or sued for an injury to its property, or a wrong done to its interests, be permitted to set up a want of such legal organization in his defense." There is a similar statute in Kentucky. Comp. Stat. 1903, § 566. Except so far as these statutes dispense with the requirements for a *de facto* corporation (see third paragraph of note 13), it is submitted that they are only declaratory (see notes 24, 25, and 33).

be a corporation can be granted only by the legislature. Is the court not to respect this division of powers, but to make itself, *de facto*, a legislature?

It may well be answered that it is not for the courts to create public officers any more than to create corporations; and yet the doctrine of *de facto* public officers is well established, and a doctrine of *de facto* corporations for the benefit of third persons has also found its place in the law.²¹

The question therefore reduces itself at last to a question of judgment. Are there considerations of public policy so urgent as to make it proper for the courts to allow persons to assert the right to be a corporation even when, on a sound construction of the legislative enactments, they have no such right? Considerations tending to an affirmative answer are that the courts should save time by refusing to go into the details of incorporation; and that they should encourage the use of the corporate device by establishing a consolation doctrine to the effect that, if persons try to form a corporation and pretty nearly succeed, they shall have pretty nearly as many rights as though they had succeeded. Considerations tending to a negative answer are that the courts should not, directly or indirectly, take to themselves powers belonging to the legislature, and that it is anomalous to bridge a legal gap even in favor of a person who has made an expenditure in good faith.

If there is a doctrine of *de facto* corporations, remedial to the associates themselves, the courts ought to enter upon it not lightly, but discreetly, advisedly.

This is not to say that there may never be circumstances in which it is proper to apply such a doctrine. Suppose that A, owner of land, purports for a consideration to grant it to a *de facto* corporation, and ejectment is brought, in the name of the corporation, against X, a stranger to the title. The associates, even if unincorporated, would, it is submitted, at least be entitled in equity to require a conveyance from A, and at law to maintain ejectment in the name of A.²² And it is the better opinion that full effect

²¹ See note 2.

²² There is authority that if a deed of real estate purports to run to a corporation, and there is no such corporation authorized by the state, the deed is void, and the grantor may successfully assert title to the land against the associates. *Harriman v. Southam*, 16 Ind. 190 (overruled in *Snyder v. Studebaker*, 19 Ind. 462); *Douthitt v. Stinson*, 63 Mo. 268 (distinguished in *Reinhard v. Virginia Co.*, 107 Mo. 616, and *White Oak Society v. Murray*, 145 Mo. 622); *White v. Campbell*, 5 Humph. (Tenn.) 38; *Russell v. Topping*, 5 McLean (U. S.) 194, 202 (but this cannot stand after *Smith v.*

may be given to the conveyance at law, — that the title may be held to vest in the associates as natural persons (and this would obviate inquiry into the question of actual consideration).²³ The

Sheeley, 12 Wall. (U. S.) 358). See also *Provost v. Morgan's Co.*, 42 La. Ann. 809; *German Ass'n v. Scholler*, 10 Minn. 331; *Valk v. Crandall*, 1 Sandf. Ch. (N. Y.) 179, 182; *Childs v. Hurd*, 32 W. Va. 66, 100.

But, by the more recent decisions, it is held that (at least if the requirements of the *de facto* doctrine are satisfied) the grantor and those in privity with him are estopped to assert title against the associates (see note 33). *Cahall v. Citizens' Ass'n*, 61 Ala. 232; *Bates v. Wilson*, 14 Colo. 140; *Thompson v. Candor*, 60 Ill. 244; *The Joliet v. Frances*, 85 Ill. App. 243; *Baker v. Neff*, 73 Ind. 68; *Williamson v. Kokomo Ass'n*, 89 Ind. 389 (junior mortgagee cannot defeat prior mortgage to *de facto* corporation); *Sword v. Wickersham*, 29 Kan. 746; *Reinhard v. Virginia Co.*, 107 Mo. 616 (and cases cited); *Frost v. Frostburg Co.*, 24 How. (U. S.) 278. See also *Keene v. Van Reuth*, 48 Md. 184; *Packard v. Old Colony Co.*, 168 Mass. 92, 96; *Smith v. Sheeley*, 12 Wall. (U. S.) 358. But cf. *Jones v. Aspen Hardware Co.*, 21 Colo. 263.

In *Otoe Ass'n v. Doman*, 95 N. W. Rep. 327 (Neb.), a *de facto* corporation maintained a proceeding against its grantor for reformation of the deed.

On a grant by a municipal corporation of a franchise to a *de facto* corporation, see *Kalamazoo v. Kalamazoo Co.*, 124 Mich. 74.

In *Whipple v. Parker*, 29 Mich. 369, *Christiancy, J.*, said (p. 381): "Courts of equity at least, if not also courts of law, would find no difficulty in recognizing their property rights as individuals, or in securing to them as a partnership, or as joint owners, or as individuals, in some form the full enjoyment of their rights." Note also *Burton v. Schildbach*, 45 Mich. 504.

On the right to maintain ejectment in the name of the grantor, note that the grantee of a disseisee might maintain ejectment in the name of his grantor. See *McMahan v. Bowe*, 114 Mass. 140, 145.

²³ In *Maugham v. Sharpe*, 17 C. B. (N. S.) 443, chattels were mortgaged to "The City Investment and Advance Company." The mortgagor believed he was conveying to a corporation (*per Erle, C. J.*, at p. 462); but there was no such corporation authorized by the state. The court held that the title passed to the individuals doing business under that name. *Williams, J.*, said (p. 463): "I apprehend, the meaning of the grant is plain: the deed purports and intends to convey the goods to those persons who use the style and firm of The City Investment and Advance Company. They may or may not be a corporation; but when it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them." *Jones v. Aspen Co.*, 21 Colo. 263, 271; *New Haven Wire Co. Cases*, 57 Conn. 352, 394; *accord*. See also *Farnsworth v. Drake*, 11 Ind. 101; *Fay v. Noble*, 7 Cush. (Mass.) 188, 194; *American Silk Works v. Salomon*, 6 T. & C. (N. Y.) 352. On a charitable bequest to a *de facto* corporation, note *Quinn v. Shields*, 62 Ia. 129 (in connection with *Miller v. Chittenden*, 2 Ia. 315, and *Grant v. Saunders*, 121 Ia. 80); *Lutheran Church v. Mook*, 4 Redf. Sur. (N. Y.) 513.

The English courts would follow *Maugham v. Sharpe*, if the subject of the conveyance was realty. *Wray v. Wray*, [1905] 2 Ch. 349. In *Byam v. Bickford*, 140 Mass. 31, *Devens, J.*, said (p. 32): "But the South Chelmsford Hall Association was a body well known, all the members of which could be ascertained; and, as it could not take as a corporation, the deed may properly be construed as a grant of the estate to those who were properly described by this title. . . . The persons associated in the society were thus tenants in common of the land conveyed." See also *Hart v. Seymour*, 147

associates are therefore asserting a property right which they are entitled to assert in some form. Looking at the substance, and not the form, the case will rarely, if ever, arise where X is prejudiced if the associates are allowed to assert the right as an artificial person.²⁴ Similarly, if X makes a note payable to A, and A negotiates it to a *de facto* corporation, and suit is brought in the name of the corporation against A.²⁵

But it would seem to be clear that there should be no sweeping doctrine to the effect that a *de facto* corporation may (unless checked by the state) exercise the same powers and privileges as

Ill. 598, 610; Clifton Heights Co. v. Randell, 82 Ia. 89; Friedman v. Goodwin, 9 Fed. Cas. 818.

And conversely a conveyance of realty to the "Asheville Division No. 15" will pass title to such corporation, although the grantor supposed he was conveying to a voluntary association. Asheville Division v. Aston, 92 N. C. 578.

On a deed to A and "associates," see Ennis v. Brown, 1 N. Y. App. Div. 22.

On whether a title in natural persons will, upon their incorporation, pass to the corporation without formal transfer, see McCandless v. Inland Acid Co., 112 Ga. 291; Land Co. v. Randell, 82 Ia. 89; Catholic Church v. Tobbein, 82 Mo. 418; American Silk Works v. Salomon, 6 T. & C. (N. Y.) 352.

²⁴ A *de facto* corporation may maintain ejectment against a person who has not dealt with the associates as a corporation. East Norway Church v. Froislie, 37 Minn. 447, 451 ("It would be unjust and intolerable if . . . every interloper and intruder were allowed thus to take advantage of every informality or irregularity of organization"); Chiniquy v. Bishop of Chicago, 41 Ill. 148. But cf. Proprietors of Southold v. Horton, 6 Hill (N. Y.) 501; Augusta Co. v. Vertrees, 4 Lea (Tenn.) 75.

It may maintain an action for a tort to real or personal property. Buffalo Co. v. Cary, 26 N. Y. 75, 77-78; Remington Co. v. O'Dougherty, 65 N. Y. 570 (conversion); Persse Works v. Willett, 1 Rob. (N. Y.) 131 (trespass upon personalty); American Silk Works v. Salomon, 6 T. & C. (N. Y.) 352 (conversion); Elizabeth Academy v. Lindsey, 6 Ired. (N. C.) 476 (conversion); Searsburgh Co. v. Cutler, 6 Vt. 315, 323 ("For the purpose . . . of protecting the property . . . from tortfeasors, it is enough to shew a corporation *de facto*"); Baltimore Co. v. Baptist Church, 137 U. S. 568, 572 (nuisance). *Per* Gray, J., a *de facto* corporation may "maintain an action against any one, other than the state, who has contracted with the corporation, or who has done it a wrong"; American Co. v. New York, 68 Fed. Rep. 227 (infringement of patent).

It may maintain a bill for an injunction to restrain irreparable injury to property. Cincinnati Co. v. Danville Co., 75 Ill. 113; Williams v. Citizens' Co., 130 Ind. 71. See also Denver v. Mullen, 7 Colo. 345.

But cf. Slocum v. Providence Co., 10 R. I. 112, 114.

²⁵ Cozzens v. Chicago Co., 166 Ill. 213; Wilcox v. Toledo Co., 43 Mich. 584, 590; Haas v. Bank of Commerce, 41 Neb. 754. See also Mix v. Bank of Bloomington, 91 Ill. 20; Chicago Co. v. Stafford County, 36 Kan. 121, 128. Cf. Marion Bank v. Dunkin, 54 Ala. 471; Hungerford Bank v. Van Nostrand, 106 Mass. 559.

An association *de facto* may recover for use and occupation of land. Philippine Sugar Co. v. U. S., 39 Ct. Cl. 225.

A grants land to a *de facto* corporation. It may maintain proceedings to have the land discharged from the incumbrance of a judgment against A. Keyes v. Smith, 67 N. J. L. 190.

a *de jure* corporation. The doctrine should never be applied, in favor of the associates themselves, to the prejudice of a person who has not dealt with them as a corporation.

Suppose A agrees to take and pay for stock in the X corporation when formed. Only a *de facto* corporation is formed. If a *de jure* corporation had been formed, it could have compelled A to pay for the stock.²⁶ But the *de facto* corporation has no such right.²⁷

Suppose the legislature has authorized the formation of railroad corporations and has authorized such corporations to condemn land. Only a *de facto* railroad corporation is formed. It cannot take land against the will of the owner.²⁸

To return to the case put in the opening paragraph. If persons

²⁶ Athol Co. v. Carey, 116 Mass. 471.

²⁷ Schloss v. Montgomery Co., 87 Ala. 411; Indianapolis Co. v. Herkimer, 46 Ind. 142; Nelson v. Blakey, 47 Ind. 38; Reed v. Richmond Co., 50 Ind. 342, 83 Ind. 9; Rikhoff v. Brown's Co., 68 Ind. 388; Coppage v. Hutton, 124 Ind. 401; Allman v. Havana Co., 88 Ill. 521; Richmond Ass'n v. Clarke, 61 Me. 351; Taggart v. Western Co., 24 Md. 563; Katama Land Co. v. Holley, 129 Mass. 540; Columbia Co. v. Dixon, 46 Minn. 463, 465; Capps v. Hastings Co., 40 Neb. 470; Dorris v. Sweeney, 60 N. Y. 463; Greenbrier Exposition v. Rodes, 37 W. Va. 738. See also McIntire v. McLain Ass'n, 40 Ind. 104; Stowe v. Flagg, 72 Ill. 397; Mansfield Co. v. Drinker, 30 Mich. 124; Crocker v. Crane, 21 Wend. (N. Y.) 211; Wilmington Co. v. Wright, 5 Jones (N. C.) 304. But cf. Willard v. Church of Rockville Centre, 66 Ill. 55.

But otherwise if the subscriber took part in the attempt to incorporate, or thereafter assented to treat with the corporation as though it had been lawfully formed (see note 33). Selma v. Tipton, 5 Ala. 787, 807; Danbury Co. v. Wilson, 22 Conn. 435; Hause v. Mannheimer, 67 Minn. 194; Cayuga Co. v. Kyle, 64 N. Y. 185; United Growers Co. v. Eisner, 22 N. Y. App. Div. 1; Tar River Co. v. Neal, 3 Hawks (N. C.) 520; Rockville Turnpike Road v. Van Ness, 2 Cranch C. C. (U. S.) 449.

See also Childs v. Smith, 46 N. Y. 34.

²⁸ Piper v. Rhodes, 30 Ind. 309 (assessment by *de facto* turnpike company); McIntire v. McLain Ass'n, 40 Ind. 104 (assessment by *de facto* drainage company); Newton Co. v. Nofsinger, 43 Ind. 566 (same); Knight v. Flatrock Co., 45 Ind. 134 (assessment of tax in aid of *de facto* turnpike company); Williamson v. Kokomo Ass'n, 89 Ind. 389, 392 (condemnation. In Boyd v. Traction Co., 161 Ind. 587, 589, the court did not find it necessary to decide the point); Hopkins v. Kansas City Co., 79 Mo. 98 (condemnation); St. Joseph Co. v. Shambaugh, 106 Mo. 557, 566 (condemnation); Hampton v. Clinton Co., 65 N. J. L. 158, 160 ("There is no doubt that non-compliance with conditions precedent to incorporation will defeat a condemnation"); N. Y. Cable Co. v. N. Y., 104 N. Y. 1, 43 (condemnation); Matter of Union Co., 112 N. Y. 61 (same); Matter of New York Co., 35 Hun (N. Y.) 220 (same. On appeal, 99 N. Y. 12); Matter of Broadway Co., 73 Hun (N. Y.) 7, 13 (same); Kinston Co. v. Stroud, 132 N. C. 413 (same. Cf. Wellington Co. v. Cashie Co., 114 N. C. 690. As to latter case, see note 12); Atlantic Co. v. Sullivant, 5 Oh. St. 276 (same); Atkinson v. Marietta Co., 15 Oh. St. 21 (same); Powers v. Hazelton Co., 33 Oh. St. 429 (same); Tulare District v. Shepard, 185 U. S. 1, 17 (same). See also Niemeyer v. Little Rock Ry., 43 Ark. 111; Fales v. Whiting, 7 Pick. (Mass.) 225; Trenton Co. v. United Co., 60

employ agents, they are responsible for the torts of those agents while they are acting within the scope of their employment. Persons injured by such torts have a well-established common law right to call upon the principal to respond. Now the legislature has authorized those persons who do specified acts to exercise the privilege of acting as an artificial person, — of holding property and appointing agents as such artificial person. If the specified acts are done, the artificial person becomes the principal, and redress may be had only out of the property of this principal. But persons who have not done the specified acts should not be given this immunity, which is dependent upon incorporation.

The subscriber to stock of a corporation to be formed has a right, under that portion of the common law which deals with contracts, to have stock of a corporation authorized by the state. The courts ought not to ignore or impair that right. The person injured by the tort of the servant has a right, under that portion of the common law which deals with torts and agents, to have the master respond. The courts ought not to ignore or impair that right.

It may be urged that the exercise of the power of eminent domain is much more important than the exercise of the power to appoint an agent as an artificial person. The exercise of such a power is indeed a high act of sovereignty, and this consideration must incline courts to construe grants of the power with great strictness.²⁹ The grant of a power to appoint an agent as an artificial person might not be construed with the same strictness. But neither power can be exercised except upon the terms laid down

N. J. Eq. 500; *Farnham v. Benedict*, 107 N. Y. 159; *New Orleans Co. v. Louisiana Co.*, 11 Fed. Rep. 277.

There is considerable authority opposed to the text. *Central of Georgia Co. v. Union Springs Co.*, 144 Ala. 639; *McAuley v. Columbus Co.*, 83 Ill. 348; *Peoria Co. v. Peoria Co.*, 105 Ill. 110; *Chicago Co. v. Chicago Co.*, 112 Ill. 589; *Morrison v. Forman*, 177 Ill. 427; *Eddeeman v. Union Co.*, 217 Ill. 409, 414; *Detroit Co. v. Campbell*, 140 Mich. 384, 394 (relying on 44 Mich. 387, and 81 Mich. 378, which only decided that the question could not be litigated in *certiorari* proceedings); *Postal Co. v. Oregon Co.*, 23 Utah 474, 482. See also *Osborn v. People*, 103 Ill. 224; *Ward v. Minnesota Co.*, 119 Ill. 287; *Reisner v. Strong*, 24 Kan. 410, 417; *Portland Co. v. Bobb*, 88 Ky. 226; *Farnham v. Delaware Co.*, 61 Pa. St. 265. But note the explanation of the Illinois doctrine made in *Henry v. Centralia Co.*, 121 Ill. 264, 267. *

On the litigation of this question in *certiorari* proceedings, see *Schroeder v. Detroit Co.*, 44 Mich. 387; *Traverse Co. v. Seymour*, 81 Mich. 378; *State v. Egg Harbor City*, 55 N. J. L. 245.

²⁹ *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483.

by the legislature. When the terms are ascertained by a proper construction of the legislative grants, it is no more proper for the courts to vary those terms in one case than in the other.

Compare the consequences of the exercise of these two powers to the person against whom they are asserted. In the one case his land is taken from him against his will, but the fair value is paid him. In the second case his body is injured, without his fault, and he is referred to an empty treasury for compensation.⁸⁰

⁸⁰ Authorities bearing on the case put in the opening paragraph of the text are as follows. In *Vredenburg v. Behan*, 33 La. Ann. 627, the plaintiff sued on account of damage done by an animal kept by the "Crescent City Rifle Club." The defendants contended that this club was a corporation, and that the corporation alone was liable for the tort. The court held that the statutes of Louisiana did not authorize the formation of such a corporation, and that the defendants—members of the club—were personally liable. "It is a principle of law that cannot be successfully controverted, that where persons sought to be made liable for their acts, imprudence, or negligence, seek to escape such liability by pleading some privilege or immunity in derogation of common right, they must clearly establish the existence of the same, and bring themselves strictly within the provisions of the law on which they rest such claim" (p. 635). (It may be suggested that Article 446 of the Civil Code prevents all recognition of the *de facto* doctrine, and that therefore the reasoning of this case has no bearing upon the proper scope of such a doctrine; but it has not been so construed. For applications of the *de facto* doctrine see *Blanc v. Germania Bank*, 114 La. 739, and cases cited.)

In *Smith v. Warden*, 86 Mo. 382, the plaintiff sued on account of a tort committed by an agent of the defendants. The defendants contended that the tortfeasor was agent of a limited partnership, and that this partnership alone was liable, as master, for the tort. But the court held that one of the acts which was a prerequisite to the formation of such a limited partnership had not been performed, and that the defendants—who were assuming to do business as such limited partnership—were personally liable.

Lamming v. Galusha, 81 Hun (N. Y.) 247 (aff. 151 N. Y. 648), is against the text. But it may be noted: (1) the plaintiff's predecessor in title had given a written consent for the construction of the railroad, which consent was intended to operate "as something more than a mere license." The railroad had been constructed at the time the plaintiff bought, and the associates were openly asserting their right to act as a corporation. The plaintiff did nothing for eight years. He then asked for an injunction and damages. (2) The opinion is of a single justice sitting at special term. He seems to have been of the opinion (p. 252) that, if there was not substantial compliance with all the provisions of the statute, there would not be a corporation *de jure* (see notes 17 and 18). He relies on California cases decided after the statute respecting *de facto* corporations had been passed (see note 20), and his attention seems not to have been called to the statute.

In *Guckert v. Hacke*, 159 Pa. St. 303, A contracted with the associates. The associates intended to contract as a corporation, and the requirements of the *de facto* doctrine were satisfied. But a condition precedent to the formation of a corporation had not been performed, and A did not know that the associates were assuming to contract as a corporation. Held, that A, since he was not estopped (see note 33),

We have thus far assumed that A, against whom the *de facto* doctrine is asserted, has not, by dealings with the associates, recognized their right to act as a corporation. But if the associates assume to act as a corporation, and A is content to deal with them as a corporation, entirely new considerations present themselves. True it is that the associates had not the corporate privilege, but does it lie in A's mouth to plead this ?

If A, suing for a breach of a contract made under such circumstances, chose to name the alleged corporation as party defendant, the associates could not in fairness ask to show that, though they had represented themselves to be a corporation and had contracted with A on that basis, yet, nevertheless, owing to their failure to comply with the statutory requirements, they had had no authority to act as a corporation.

The converse is not so clear. A never represented that the associates were a corporation ; he simply acted on their own representation. Nevertheless, he has consented to enter into a contract with the associates on a corporate basis. The associates expected to be shielded, by their possession of the corporate privilege,

could hold the associates personally liable for a breach of the contract. *Christian Co. v. Lumber Co.*, 121 Ala. 340 ; *Field v. Cooks*, 16 La. Ann. 153 ; *N. Y. Bank v. Crowell*, 177 Pa. St. 313 ; *Slocum v. Head*, 105 Wis. 431 ; *Clausen v. Head*, 110 Wis. 405 ; *accord.* See also *Williams v. Hewitt*, 47 La. Ann. 1076, 1082 ; *Johnson v. Okerstrom*, 70 Minn. 303, 311 ; *Queen City Co. v. Crawford*, 127 Mo. 356, 363 ; *Vanhorn v. Corcoran*, 127 Pa. St. 255, 268 (*cf.* *Allegheny Bank v. Bailey*, 147 Pa. St. 111) ; *Mitchell v. Jensen*, 29 Utah 346, 360.

Hampton v. Clinton Co., 65 N. J. L. 158, 160. "The cases to which we have been referred, as holding that persons dealing with *de facto* corporations are estopped from denying their legal existence and that such corporations may, by actions at law, protect their rights and property against invasion, are not applicable to the present controversy. Here there is an attempt to take the property of a citizen against his will."

Searsburgh Co. v. Cutler, 6 Vt. 315, 323. "Where an authority is claimed, by virtue of corporate powers, to interfere with the person or property of the citizen, greater strictness is required."

Slocum v. Head, 105 Wis. 431, 434 (paraphrased). An examination of all the authorities, however, limits the immunity from personal liability, which may be claimed by those who have in good faith attempted to organize and do business as corporations, to transactions with persons who have dealt with them as a corporation.

Note also the restrained language of Mr. Justice Gray in *Baltimore Co. v. Baptist Church*, 137 U. S. 568, 571, 572. A *de facto* corporation may "maintain an action against any one, other than the state, who has contracted with the corporation, or who has done it a wrong." To the same effect are *Tar River Co. v. Neal*, 3 Hawks (N. C.) 520, 537 ; *Savings Bank Co. v. Miller*, 24 Oh. Circ. Ct. Rep. 198, 206. And see the Iowa and Kentucky statutes (note 20).

against unlimited liability for a breach of the contract, and A may fairly be charged with knowledge of this. In consenting to contract with them as a corporation, he has, by necessary inference, consented to avail himself on a breach of the contract of only such remedies as could be used if the associates possessed the corporate privilege. "Upon broad grounds of right, justice, and equity,"⁸¹ A ought not, with his eyes open, to enter into a contract which assumes the existence of a corporation, and then ask for remedies which involve a denial of such existence. In a word, not only against the associates, but against A, there is the proper basis for the argument *ad hominem*.

While, however, it is fair between the parties that a contract made on a corporate basis should be enforced on the same basis, is it not against public policy thus to allow parties to create *pro tanto* corporations at their will? A court might consider this objection fatal; and, even when A sues the corporation, and shows that the requirements of the *de facto* doctrine are satisfied, it might permit the associates to take advantage of their own failure to observe the statutes.⁸² But it is rare for a court to take this extreme position.

It is in this connection that the courts make the most important application of the *de facto* conception. If associates have assumed to contract as a corporation, and the requirements of the *de facto* doctrine are satisfied, then, ordinarily, there will be no sufficient objection, on the ground of public policy, to permitting both parties to the contract to have such remedies, and such remedies only, as would be permitted if a *de jure* corporation had been formed.⁸³

⁸¹ *Per* Cooley, J., in *Swartwout v. Michigan Co.*, 24 Mich. 389, 396.

⁸² So held in *Boyce v. Towsontown Church*, 46 Md. 359.

⁸³ The associates, if sued as a corporation, cannot defend on the ground that they were not authorized to act as a corporation when the contract was made. *Georgia Ice Co. v. Porter*, 70 Ga. 637; *Racine Co. v. Farmers' Trust Co.*, 49 Ill. 331, 346 (*cf.* *Gent v. Manufacturers Co.*, 107 Ill. 652); *Humphrey v. Patrons' Ass'n*, 50 Ia. 607 (*cf.* *Kirkpatrick v. Church of Keota*, 63 Ia. 372); *Dooley v. Cheshire Glass Co.*, 15 Gray (Mass.) 494; *Kelley v. Newburyport Co.*, 141 Mass. 496; *Empire Co. v. Stuart*, 46 Mich. 482; *Scheufler v. Grand Lodge*, 45 Minn. 256; *Callender v. Painesville Co.*, 11 Oh. St. 516; *Hamilton v. Clarion Co.*, 144 Pa. St. 34; *Liter v. Ozokerite Co.*, 7 Utah 487; *Toledo Co. v. Continental Trust Co.*, 95 Fed. Rep. 497, 507. See also *McCullough v. Talladega Co.*, 46 Ala. 376; *Wood v. Wiley Construction Co.*, 56 Conn. 87; *Commonwealth v. Licking Valley Ass'n*, 118 Ky. 791; *Perine v. Grand Lodge*, 48 Minn. 82; *Rush v. Halcyon Co.*, 84 N. C. 702; *Miss. Code*, § 841. *Contra*, *Boyce v. Towsontown Church*, 46 Md. 359 (but *cf.* *Franz v. Teutonia Ass'n*, 24 Md. 259; *Keene v. Van Reuth*, 48 Md. 184; *Bartlett v. Wilbur*, 53 Md. 485, 498).

The state may properly make a *de facto* corporation sole defendant (not joining the

Whether, when the requirements of the *de facto* doctrine have

associates) in a *quo warranto* proceeding. *New Orleans Co. v. Louisiana*, 180 U. S. 320.

Similarly, a creditor may hold the defendant, as a stockholder, director, or officer, to such liability as would have attached to him if the associates had been authorized to act as a corporation when the contract was made. *Lehman v. Warner*, 61 Ala. 455; *Central Ass'n v. Alabama Co.*, 70 Ala. 120; *Harris v. Gateway Co.*, 128 Ala. 652; *Corwith v. Culver*, 69 Ill. 502; *Wheelock v. Kost*, 77 Ill. 296; *Tanner v. Nichols*, 80 S. W. Rep. 225 (Ky.); *Priest v. Essex Hat Co.*, 115 Mass. 380; *Eaton v. Aspinwall*, 19 N. Y. 119 (see also 26 Barb. (N. Y.) 202); *Perkins v. Hatch*, 4 Hun (N. Y.) 137; *Rowland v. Meader Co.*, 38 Oh. St. 269, 272 (citing 33 Oh. St. 107); *Hamilton v. Clarion Co.*, 144 Pa. St. 34; *Slocum v. Providence Co.*, 10 R. I. 112; *Slocum v. Warren*, 10 R. I. 116. See also *Peel's Case*, L. R. 2 Ch. 674. *Cf. Utley v. Union Tool Co.*, 11 Gray (Mass.) 139; *DeWitt v. Hastings*, 69 N. Y. 518; *Gardner v. Post*, 43 Pa. St. 19.

One of the associates cannot take advantage, against his fellow associates, of the lack of authority to act as a corporation. *Merchants Line v. Waganer*, 71 Ala. 581, 585; *Bushnell v. Consolidated Ice Co.*, 138 Ill. 67; *Curtis v. Tracy*, 169 Ill. 233; *Lincoln Park v. Swatek*, 204 Ill. 228; *Heald v. Owen*, 79 Ia. 23; *Venable v. Atchison Church*, 25 Kan. 177; *Foster v. Moulton*, 35 Minn. 458; *Raisbeck v. Oesterricher*, 4 Abb. N. C. (N. Y.) 444; *Marsh v. Mathias*, 19 Utah 350; *Franke v. Mann*, 106 Wis. 118. See also *Baker v. Backus*, 32 Ill. 79. *Cf. Flagg v. Stowe*, 85 Ill. 164; *Doyle v. Mizner*, 42 Mich. 332. If one of the associates is, owing to the lack of authority, subjected to personal liability, he may have contribution. *Richardson v. Pitts*, 71 Mo. 128; *Aspinwall v. Sacchi*, 57 N. Y. 331. *Cf. Heald v. Owen*, 79 Ia. 23.

Conversely, the body of associates cannot take advantage of such lack against one of their number. *Meurer v. Detroit Ass'n*, 95 Mich. 451.

If A promises B a commission for selling property to C, or any corporation organized by him, and a *de facto* corporation, organized by C, purchases the property, B is entitled to his commission. *Smith v. Mayfield*, 163 Ill. 447.

If A contracts with the associates as a corporation, and A is sued upon the contract in the name of the corporation, he cannot take advantage of their lack of authority to act as a corporation. *Bibb v. Hall*, 101 Ala. 79; *Canfield v. Gregory*, 66 Conn. 9; *Wood v. Coosa Co.*, 32 Ga. 273; *Petty v. Brunswick Co.*, 109 Ga. 666; *Marsh v. Astoria Lodge*, 27 Ill. 421; *Ramsey v. Peoria Co.*, 55 Ill. 311; *Hudson v. Green Hill Corporation*, 113 Ill. 618; *Brownlee v. Ohio Co.*, 18 Ind. 68; *Bartholomew County v. Bright*, 18 Ind. 93; *Mullen v. Beech Grove Park*, 64 Ind. 202; *Beatty v. Bartholomew Society*, 76 Ind. 91; *Jones v. Kokomo Ass'n*, 77 Ind. 340; *Smelser v. Wayne Co.*, 82 Ind. 417; *Cravens v. Eagle Co.*, 120 Ind. 6; *Washington College v. Duke*, 14 Ia. 14; *Hunt v. Kansas Co.*, 11 Kan. 412; *Gill v. Kentucky Co.*, 7 Bush (Ky.) 635; *Seven Star Grange v. Ferguson*, 98 Me. 176; *Worcester Medical Institution v. Harding*, 11 Cush. (Mass.) 285; *Butchers' Bank v. McDonald*, 130 Mass. 264; *Cahill v. Kalamazoo Co.*, 2 Doug. (Mich.) 124; *Swartwout v. Michigan Co.*, 24 Mich. 389; *Estey Co. v. Runnels*, 55 Mich. 130; *Stofflet v. Strome*, 101 Mich. 197; *French v. Donohue*, 29 Minn. 111; *Minnesota Co. v. Denslow*, 46 Minn. 171; *Lincoln Ass'n v. Graham*, 7 Neb. 173; *Livingston Ass'n v. Drummond*, 49 Neb. 200; *Equitable Ass'n v. Bidwell*, 60 Neb. 169; *Ossipee Co. v. Canney*, 54 N. H. 295 (explaining *Unity Co. v. Cram*, 43 N. H. 636); *Way v. American Grease Co.*, 60 N. J. Eq. 263, 266; *Methodist Church v. Pickett*, 19 N. Y. 482; *Leonardsville Bank v. Willard*, 25 N. Y. 574; *Buffalo Co. v. Cary*, 26 N. Y. 75; *Phoenix Co. v. Badger*, 67 N. Y. 294, 298; *Com-*

not been satisfied, considerations of public policy will prevent

mercantile Bank *v.* Pfeiffer, 108 N. Y. 242, 254 (to same effect, 15 Abb. Pr. (N. Y.) 66; 33 N. Y. App. Div. 231; 43 N. Y. App. Div. 386; 48 N. Y. App. Div. 359; 24 Barb. (N. Y.) 395; 37 Barb. (N. Y.) 601; 42 Barb. (N. Y.) 651; 4 Den. (N. Y.) 392; 1 Hall (N. Y.) 191; 6 Hun (N. Y.) 71; 91 Hun (N. Y.) 236; 14 Johns. (N. Y.) 238; 3 Sandf. (N. Y.) 161; 3 T. & C. (N. Y.) 304. Welland Co. *v.* Hathaway, 8 Wend. (N. Y.) 480, and First Baptist Church *v.* Rapalee, 16 Wend. (N. Y.) 605, can no longer be considered law); Bank of Circleville *v.* Renick, 15 Oh. 322; Lucas *v.* Greenville Ass'n, 22 Oh. St. 339; Hagerman *v.* Ohio Ass'n, 25 Oh. St. 186; Washington Ass'n *v.* Stanley, 38 Ore. 319, 327; Dyer *v.* Walker, 40 Pa. St. 157; Spahr *v.* Farmers' Bank, 94 Pa. St. 429; Providence Co. *v.* Murphy, 8 R. I. 131; Merriman *v.* Magiveny, 12 Heisk. (Tenn.) 494; Singer Co. *v.* Bennett, 28 W. Va. 16; Bon Aqua Co. *v.* Standard Co., 34 W. Va. 764; Gilman *v.* Druse, 111 Wis. 400; Chubb *v.* Upton, 95 U. S. 665; Andes *v.* Ely, 158 U. S. 312, 322 (to same effect, 110 Fed. Rep. 845; 113 Fed. Rep. 398; 118 Fed. Rep. 190; 28 Fed. Cas. 839). See also West Winsted Bank *v.* Ford, 27 Conn. 282; Imboden *v.* Etowah Co., 70 Ga. 86, 107; Blanc *v.* Germania Bank, 114 La. 739; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 101; Quincy Canal *v.* Newcomb, 7 Met. (Mass.) 276, 282; Dooley *v.* Wolcott, 4 Allen (Mass.) 406; Appleton Co. *v.* Jesser, 5 Allen (Mass.) 446; Augur Co. *v.* Whittier, 117 Mass. 451, 455; Williamsburg Co. *v.* Frothingham, 122 Mass. 391; Provident Institution *v.* Burnham, 128 Mass. 458; Mann *v.* Williams, 143 Mass. 394; Chase's Co. *v.* Boston Co., 152 Mass. 428; Kansas City Co. *v.* Hunt, 57 Mo. 126; Johnston Co. *v.* Clark, 30 Minn. 308; Fayetteville Co. *v.* Tillinghast, 119 N. C. 343 (lease); Rafferty *v.* Bank of Jersey City, 33 N. J. L. 368 (preferred creditor); Central Co. *v.* Claves, 21 Vt. 30. *Cf.* Card *v.* Moore, 68 N. Y. App. Div. 327; *aff.* 173 N. Y. 598.

But there may be considerations of public policy so strong that they overcome the considerations of fairness between the parties. See Jones *v.* Aspen Hardware Co., 21 Colo. 263.

On conveyances to a *de facto* corporation, see second paragraph of note 22.

On an action in tort, where "its necessary basis is in the rights of a passenger, by virtue of the contract," see Pinkerton *v.* Pennsylvania Co., 193 Pa. St. 229, 234.

If A contracts with the associates as a corporation, A cannot, because of their lack of authority to act as a corporation, hold the associates personally liable for a breach of the contract. Sniders' Co. *v.* Troy, 91 Ala. 224; Cory *v.* Lee, 93 Ala. 468; Owensboro Co. *v.* Bliss, 132 Ala. 253; Humphreys *v.* Mooney, 5 Colo. 282; Stafford Bank *v.* Palmer, 47 Conn. 443; Canfield *v.* Gregory, 66 Conn. 9, 17; Planters' Bank *v.* Padgett, 69 Ga. 159; Doty *v.* Patterson, 155 Ind. 60; Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83; Merchants Bank *v.* Stone, 38 Mich. 779; American Co. *v.* Bulkley, 107 Mich. 447; Love *v.* Ramsey, 139 Mich. 47; Finnegan *v.* Noerenberg, 52 Minn. 239; Johnson *v.* Okerstrom, 70 Minn. 303 (distinguishing Johnson *v.* Corser, 34 Minn. 355); Richards *v.* Minnesota Bank, 75 Minn. 196; Kleckner *v.* Turk, 45 Neb. 176; Hogue *v.* Capital Bank, 47 Neb. 929 (commenting on earlier cases and statutes); Larned *v.* Beal, 65 N. H. 184; Stout *v.* Zulick, 48 N. J. L. 599; Vanneman *v.* Young, 52 N. J. L. 403; Whitford *v.* Laidler, 94 N. Y. 145, 151 (see also Central Bank *v.* Walker, 66 N. Y. 424; but *cf.* Fuller *v.* Rowe, 57 N. Y. 23); Rowland *v.* Meader Co., 38 Oh. St. 269; Mason *v.* Stevens, 16 S. D. 320; Shields *v.* Clifton Co., 94 Tenn. 123; Tennessee Co. *v.* Massey, 56 S. W. Rep. 35 (Tenn.); American Co. *v.* Heidenheimer, 80 Tex. 344; Clausen *v.* Head, 110 Wis. 405 (see also 32 Wis. 162; but *cf.* Bergeron *v.* Hobbs, 96 Wis. 641, and 64 Fed. Rep. 90). See also Clark *v.* Richardson, 31 S. W. Rep. (Ky.) 878; Laffin Co. *v.* Sinsheimer, 46 Md. 315; First Bank

courts from applying the same doctrine between the parties, is a question beyond the limits of this article.³⁴

In summary.

1. When the existence of a corporation is only collaterally in issue, proof of facts sufficient to satisfy the requirements of the *de facto* doctrine is sufficient to make a *prima facie* case.

2. If a corporation is in existence, but there is a ground upon which the state might have its existence forfeited, no one but the state can take advantage of this cause of forfeiture.

3. Most failures to conform strictly to statutory provisions regarding the formation and regulation of corporations are not fatal to the formation of a *de jure* corporation. But failure to perform an act, the performance of which the legislature has intended to be a condition precedent to incorporation, is necessarily fatal.

4. There are considerations of public policy so urgent as to justify the courts in holding that a *de facto* corporation may be a conduit of title.

5. The *de facto* doctrine has a very important scope in cases where contracts have been made on a corporate basis.

6. If associates who have not the corporate privilege assume to exercise it, there is no established doctrine that all but the

v. Almy, 117 Mass. 476; *Gow v. Collin Co.*, 109 Mich. 45; *National Bank v. Rockefeller*, 195 Mo. 15; *Second Bank v. Hall*, 35 Oh. St. 158; *Wentz v. Lowe*, 3 Atl. Rep. 878 (Pa.); *Cochran v. Arnold*, 58 Pa. St. 399; *Whitney v. Wyman*, 101 U. S. 392. *Contra*, *Garnett v. Richardson*, 35 Ark. 144; *Bigelow v. Gregory*, 73 Ill. 197; *Kaiser v. Lawrence Bank*, 56 Ia. 104; *Williams v. Hewitt*, 47 La. Ann. 1076; *Sentell v. Rives*, 48 La. Ann. 1214; *Hurt v. Salisbury*, 55 Mo. 310; *Ferris v. Thaw*, 72 Mo. 446 (but *cf. Granby Co. v. Richards*, 95 Mo. 106, and *National Bank v. Rockefeller*, 195 Mo. 15).

But if persons who assume corporate powers without complying with the statutory provisions are, by statute, expressly subjected to individual liability on all contracts made in the name of the alleged corporation, then the creditor may hold such persons to liability, for otherwise the statutory provision would be nugatory. *Loverin v. McLaughlin*, 161 Ill. 417, 434 (*cf. 83 Ill. App. 643*). To the same effect, on a similar statute, are *Eisfeld v. Kenworth*, 50 Ia. 389; *Marshall v. Harris*, 55 Ia. 182; *Clegg v. Hamilton Co.*, 61 Ia. 121; *Heuer v. Carmichael*, 82 Ia. 288 (*cf. Bank of Davenport v. Davies*, 43 Ia. 424, followed in *Jessup v. Carnegie*, 80 N. Y. 441); *Sweney v. Talcott*, 85 Ia. 103; *Thornton v. Balcom*, 85 Ia. 198. And see *Stokes v. Findlay*, 4 McCrary (U. S.) 205.

If A deals with the associates as partners, and thereafter the associates are legally incorporated, but continue to deal with A without giving him notice of the incorporation, they are liable as partners. *Perkins v. Rouss*, 78 Miss. 343; *Martin v. Fewell*, 79 Mo. 401, 412; *McGowan v. American Co.*, 121 U. S. 575.

³⁴ See note 13.

state must submit. It is not proper to apply to such a case the doctrine that the existence of a corporation cannot be attacked collaterally.

7. The *de facto* doctrine should be applied with caution when it is invoked for the benefit of the associates themselves against persons who have not dealt with them as a corporation. It is anomalous to permit the usurper of a right to require a stranger to submit to the assertion of such right.

8. It is anomalous to bridge a legal gap, even for the benefit of a person who has made an expenditure in good faith.

9. There may be no objection to applying the doctrine for the benefit of the associates themselves against strangers, if the associates are asserting a right which is in them either as natural persons or as a corporation.

10. The doctrine should never be applied for the benefit of the associates themselves to the prejudice of an innocent stranger.

Edward H. Warren.

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CONSTITUTIONALITY OF THE FEDERAL EMPLOYERS' LIABILITY ACT. — In pursuance of the recent policy of exploiting the long unexercised power "to regulate commerce . . . among the several states,"¹ Congress last year passed the Federal Employers' Liability Act, providing that "every common carrier engaged in trade or commerce . . . between the several states . . . shall be liable to any of its employees or in case of his death to his personal representative . . . for all damages which may result from the negligence of any of its officers, agents or employees . . ."² Almost simultaneously this statute has been held unconstitutional by two federal circuit courts. *Brooks v. Southern Pac. Co.*, 148 Fed. Rep. 986 (Circ. Ct., W. D. Ky.); *Howard v. Illinois Cent. R. R. Co.*, 148 Fed. Rep. 997 (Circ. Ct., W. D. Tenn., W. D.). Each court rested its decision primarily on the ground that the Act is not a regulation of interstate commerce within the constitutional powers of Congress; though each gave the alternative reason that even if the Act does so regulate interstate commerce, it also, by its terms, regulates purely intrastate commerce and constitutes one inseparable whole. The latter objection is merely verbal and easily avoidable. The former objection raises a question fundamentally important and embarrassingly difficult. The answer to it seems indicated by practically no authority even approximately in point; for the former disinclination of Congress to exercise its interstate commerce powers has allowed few adjudications on their scope. The Safety Appliance Act,³ the constitutionality of which seems to have been acquiesced in but not directly adjudged by the United States Supreme Court,⁴ is a regulation as to cars actually moving interstate traffic, to secure the safety of employees and travellers on interstate journeys, — a very different sort of act from the one now in question.

¹ U. S. Const., Art. 1, § 8, cl. 3. See also cl. 18.

² 34 Stat. at L. 232, 233.

³ 27 Stat. at L. 531, 532.

⁴ *Johnson v. Southern Pacific Co.*, 196 U. S. 1.

The constitutionality of the National Arbitration Act seems to have been passed upon only by the same judge who decided the first of the present cases.⁶ Moreover, decisions as to the validity of state statutes regulating incidents of interstate commerce, in the absence of congressional action,⁶ and as to the power of Congress over foreign commerce,⁷ have little value in determining the precise limits of Congress' interstate commerce power. These limits, therefore, can be discovered only by ascertaining from general considerations what is interstate commerce and what constitutes a regulation of it.

Interstate commerce, said Judge Field, "comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities . . . between citizens of different states."⁸ Now the trafficking of a common carrier in the labor of its employees is certainly not interstate commerce.⁹ Consequently, if the present enactment be a regulation of commerce, it is so because it indirectly regulates the transportation or transit of persons or property between the states.⁹ Undoubtedly Congress may indirectly regulate interstate commerce by regulating its instrumentalities.¹⁰ On the other hand the power does not "apply to all the incidents to which the commerce might give rise and to all contracts which might be made in the course of its transaction,"¹¹ nor to its instrumentalities except as affecting the interstate commerce itself;¹² for then that power would be made to "embrace the entire sphere of mercantile activity in any way connected with trade between the states."¹¹ Betwixt these two clear extremes there lies a shadowy region of doubt. "The precise limit of the power of Congress . . . cannot be determined by the application of technical or definite rules. The question can often be solved only by considering the true spirit and purpose of the Constitution and the practical results of the legislation in question."¹³ It is accordingly important to bear in mind the fact that the interstate commerce power was granted to secure an interstate commerce unobstructed by invidious distinctions arising from local interests, and subject only to uniform regulations.¹⁴ Judged by these considerations, the act in question seems wanting. It does not directly regulate interstate commerce; it does not regulate an instrumentality in a particular bearing substantially on interstate commerce; it subverts no object sought through the interstate commerce clause. How can it fairly be said to render interstate transportation or transit safer or better? On the contrary, the whole scope and spirit of the law makes it transparent that the enactment actually results, and was designed to result,

⁶ See RECENT CASES, p. 499.

⁶ See *Peirce v. Van Dusen*, 78 Fed. Rep. 693, 698.

⁷ See *Prentice*, Fed. Power over Carriers and Corp., 48, 221.

⁸ See *Welton v. State of Missouri*, 91 U. S. 275, 280. See also *Hopkins v. United States*, 171 U. S. 578, 597. Cf. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 189 (*per Marshall, C. J.*), 229 (*per Johnson, J.*, concurring); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203.

⁹ See *County of Mobile v. Kimball*, 102 U. S. 691, 702.

¹⁰ See *Welton v. State of Missouri*, *supra*; *Sherlock v. Alling*, 93 U. S. 99, 103; *Gloucester Ferry Co. v. Pennsylvania*, *supra*; *United States v. E. C. Knight Co.*, 156 U. S. 1, 13; *Hopkins v. United States*, *supra*.

¹¹ See *Hooper v. California*, 155 U. S. 648, 655; *Williams v. Fears*, 179 U. S. 270, 278. See also *Sherlock v. Alling*, *supra*.

¹² See *Northern Securities Co. v. United States*, 193 U. S. 197, 402 (*per Holmes, J.*, dissenting).

¹³ See 17 HARV. L. REV. 536.

¹⁴ See *Veazie v. Moore*, 14 How. (U. S.) 568, 574.

in a regulation not of interstate commerce but of another subject which Congress is not empowered to regulate, — the liabilities of employer to employee.

EFFECT OF LAPSE ON EXECUTORY GIFTS OTHERWISE ILLEGAL. — An executory devise or bequest cannot take effect unless the precise contingency happen upon which it is conditioned. Divestiture must be by the testator's express authority, and if the appointed contingency do not happen, lapse of the preceding interest is not enough.¹ The contingency may, however, be such as to be contained in such a lapse. For instance, a gift over if A die under twenty-one takes effect if A, during his minority, predecease the testator.² An executory gift must also run a second gauntlet. Though adequately satisfying the testator's intention as declared in his will, it may yet fall foul of some collateral rule of law. Since a will is ambulatory and without legal significance till the testator's death,³ that would seem the sensible period to look to in order to determine whether its provisions are obnoxious. The law takes no wanton pleasure in thwarting the intention of testators. Accordingly, if the presence of a preceding interest is the sole objection to the legality of a gift, failure of that interest before the testator's death should remove all taint of illegality.

The rule against perpetuities adopts this sane view. A gift, too remote at the writing of the will, nevertheless stands if by lapse of preceding interests it is at the testator's death no longer too remote.⁴ An analogous case presents itself where a life interest is given in a consumable chattel. The nature of the property is such that a life interest carries the entire ownership, and a gift over thereafter must normally fail. But if the life interest lapse, the objection disappears. An English case, however, holds otherwise.⁵ Similarly where a fee is given in land or an absolute interest in personalty, a gift over in the event that the first taker die intestate, or not having parted with it in his lifetime, is bad, because a real or fancied restraint upon the preceding gift.⁶ If, however, by lapse there is at the testator's death no preceding interest that can be illegally intrinched upon, all reason again vanishes for invoking a collateral rule of law to foil the testator. And so the American cases hold.⁷ Two English cases⁸ to the contrary have been disapproved,⁹ but not overruled.

A Missouri court has recently passed upon this question without reference to the adjudged law or its analogies. A testator gave his brother money, directing that any remainder at his death be divided between two nieces. The brother predeceased the testator. The court declared that the testator had given expression to two irreconcilable purposes, the first of

¹ *Tarback v. Tarback*, 4 L. J. Ch. 129.

² *Mathis v. Hammond*, 6 Rich. Eq. (S. C.) 121; *Wager v. Wager*, 96 N. Y. 164. Cf. *Jones v. Westcomb*, 1 Eq. Cas. Abr. 245, pl. 10; *Avelyn v. Ward*, 1 Ves. Sr. 420. See 2 *Jarman, Wills*, 6 ed., 760-768.

³ *Lomax v. Holmden*, 1 Ves. Sr. 290.

⁴ *In re Lowman*, [1895] 2 Ch. 348. See *Gray, Rule Perp.*, § 231.

⁵ *Andrew v. Andrew*, 1 Coll. 686.

⁶ See *Gray, Restraints on Alien.*, §§ 56, 57, 74 a; 17 *HARV. L. REV.* 190.

⁷ *Burbank v. Whitney*, 24 Pick. (Mass.) 146; *Crozier v. Bray*, 39 Hun (N. Y.) 121. See *Eaton v. Straw*, 18 N. H. 320, 333.

⁸ *Hughes v. Ellis*, 20 Beav. 193; *Greated v. Greated*, 26 Beav. 621.

⁹ *In re Stringer's Estate*, 6 Ch. D. 1, 15. But cf. 2 *Jarman, Wills*, 6 ed., 19.

which was clearly dominant, and that the gift over was therefore repugnant and void. *Young v. Robinson*, 99 S. W. Rep. 20 (K. C. Ct. App.). There is in the nature of things nothing irreconcilable about giving property to one person, and what remains at his death to another. Talk about repugnancy, common with American courts, only befogs real objections.⁶ The testator here directed that, if any of the money were left at his brother's death, the nieces should have it, — a perfectly rational contingency. Only a casuist could argue that, because all was left, the contingency was not satisfied. Ordinarily a collateral rule of law would defeat the gift over, either because unlawfully derogating from a preceding gift, or because, as so often alleged, repugnant to it. But here is no longer any interest from which there can be derogation or to which there can be repugnance. The problem is somewhat complicated by a residuary clause, and another directing that the shares of those who should die before receiving them should fall into the residue. The latter clause would seem naturally to provide only against a lapse in the residue, for specific legacies would fall into it anyhow;¹⁰ but the court construed it to refer to both. The true result is not thereby changed, for it must be read as a provision of lapse only. Where a specific legacy is given to two persons in succession, the death which shall throw the whole into the residue must be taken to be that of the last person in the series entitled.¹¹

LIABILITY OF A SURETY AFTER PAYMENT BY AN INSOLVENT DEBTOR HAS BEEN RECOVERED BY HIS TRUSTEE IN BANKRUPTCY. — The cases are in conflict whether the payee of a note, who has been compelled to surrender a payment as a fraudulent preference, can still hold the sureties. A recent case holds that he may, though having known of the debtor's insolvency. *Hooker v. Blount*, 97 S. W. Rep. 1083 (Tex., Civ. App.). An objection which may be urged at the outset is that the note has been paid and the surety parties thereby discharged. It has, however, often been held that an invalid payment does not release the surety, even though the note may have been cancelled in consequence.¹ The strongest reason for giving the surety a defense is that his right of subrogation has for a time been tied up, and consequently his risk increased. But this is a defense which rests upon equitable grounds and should be allowed only when it will do equity. Holding the surety discharged places the creditor in a peculiarly difficult situation. If he accepts a payment which afterwards he is obliged to refund as a fraudulent preference because of bankruptcy within four months, his rights against the sureties are gone. And yet the same result follows if he refuses to accept a payment tendered at maturity and bankruptcy does not follow.² In short, the only case where his remedy would be preserved against the surety is where payment is refused and bankruptcy does follow within the four months. The almost impossible task of determining the outcome of the debtor's financial situation should not in this way be imposed upon the creditor. An English case has held that when a creditor has innocently received a preference which he must pay back, he may still

¹⁰ *Bagwell v. Dry*, 1 P. Wms. 700.

¹¹ *Morton v. Barrett*, 22 Me 257.

¹ *Williams v. Gilchrist*, 11 N. H. 535; *West Phila. Nat'l Bank v. Field*, 143 Pa. St. 473. See also 17 HARV. L. REV. 205.

² *Smith v. Old Dominion Bldg. & Loan Ass'n*, 119 N. C. 257; *Second Nat'l Bank v. Prewett*, 96 S. W. Rep. 334 (Tenn.).

hold the surety.³ The same result should follow when payment is received with knowledge of insolvency, because even so the creditor is unable to determine until after the bankruptcy of his debtor whether he may be allowed to keep the payment so made. Under the Bankruptcy Act of 1898⁴ a preference, even though innocently received, could not be retained by the creditor desiring to prove in bankruptcy;⁵ and here giving a defense to the surety after surrender of such a payment worked an especially harsh result. Under the Act as amended in 1903,⁶ proof is allowed if a preference, innocently received, is retained. Nevertheless, for the reasons given, the creditor should still have his right against the surety, irrespective of his knowledge of the insolvency.

A more difficult question arises when the creditor, after the adjudication in bankruptcy, refuses to surrender a preference voluntarily, but is later compelled to do so. Here it may with some force be said that the creditor has wilfully endangered the subrogation. It may be, however, that he is in doubt whether the payment can be avoided by the trustee, and desires to test that right in a judicial tribunal. Such a course, which may, if the creditor is successful, enure to the surety's benefit, should not be the means of affording the latter a defense. This result is in accord with the reasoning of the United States Supreme Court, which has held that the surrender of a preference does not have to be voluntary in order to entitle the creditor to prove in bankruptcy.⁷ An interesting solution of the general question, suggested in one case, is for the creditor to notify the surety of the facts, and then if the latter does not advise a course to pursue, the creditor may proceed and receive the payment without prejudice.⁸ This is a practical rule, but there seems no need to quarrel with the result of the present authority, which, as in the principal case, permits the creditor to take reasonable measures on his own initiative.⁹

NECESSITY OF NOTICE TO A GUARANTOR OF ACCEPTANCE AND DEFAULT. — How far notice of acceptance and default is necessary in order that the creditor may hold the guarantor is a troublesome question in the law of guaranty upon which the cases are hopelessly irreconcilable. As to notice of acceptance the first inquiry is whether it is always, as some courts hold,¹ an essential element in the formation of the contract of guaranty. A distinction between bilateral and unilateral contracts must be made. In a bilateral contract the consideration for the offer is a counter-promise, which until communicated has no legal effect. Here the notice in the form of an

³ *Petty v. Cooke*, L. R. 6 Q. B. 790.

⁴ § 57 g.

⁵ *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438.

⁶ § 12.

⁷ *Keppel v. Tiffin Savings Bank*, 197 U. S. 356.

⁸ *Northern Bank of Kentucky v. Cooke*, 13 Bush (Ky.) 340.

⁹ *Second Nat'l Bank v. Prewett*, *supra*; *Swarts v. Fourth Nat'l Bank of St. Louis*, 117 Fed. Rep. 1; *Watson v. Poague*, 42 Ia. 582; *Harner v. Batdorf*, 35 Oh. St. 113; *Northern Bank of Ky. v. Farmers' Nat'l Bank of Cynthiana*, 23 Ky. L. Rep. 696. *Contra*, *In re Ayers*, 6 Biss. (U. S.) 48. And see *Bartholow v. Bean*, 18 Wall. (U. S.) 635, 642; *In re Harpke*, 116 Fed. Rep. 295, 298.

¹ *Davis v. Wells*, 104 U. S. 159; *Winnebago Paper Mills Co. v. Travis*, 56 Minn. 480.

acceptance is needed to complete the contract. In a unilateral contract, on the other hand, since the consideration for the promise is doing an act, the offer becomes binding at once upon performance of the act requested. Consequently, if giving notice is not one of the things requested to be done, notice need not be given in order to make the offer binding.² If notice, unasked for by the guarantor, is required by the law, its nature must be that of a condition subsequent, the breach of which gives the guarantor an option to avoid liability.³ The English rule is settled that in every unilateral contract of guaranty notice of acceptance is unnecessary.⁴ On the other hand, impelled by the analogies of the law merchant and by considerations of fairness to the guarantor, to whom knowledge of acceptance would not in the ordinary case come quickly, by far the greater number of American courts require notice so that he may know of his liability and take steps to protect himself.⁵ Since the latter rule is essentially based on considerations of fairness, notice is unnecessary where the equity of the situation would not require it. Hence, if the guarantor has actual knowledge of the acceptance, or if it is fair to charge him therewith, no notice need be given.⁶ And, as regards the latter, such was the holding in a recent New York case. *Drucker v. Heyl-Dia*, 52 N. Y. Misc. 142. In continuing guaranties all that fairness requires is notice at the beginning and at the close of the account.⁷ It is true that some courts undertake to distinguish between an absolute guaranty and an offer to guaranty; but since the so-called absolute guaranty until accepted is no more than an offer to guaranty, this attempted distinction is without foundation.⁸ Even in bilateral contracts if the contingency of liability is uncertain and remote, and at the will of some party other than the guarantor, the same reasons of fairness would require notice of performance, in addition to communication of acceptance, as in unilateral contracts.⁹

Notice of default in order to hold the guarantor is by the weight of authority unnecessary.¹⁰ It is, of course, a general principle of suretyship that the creditor owes no affirmative duty to the surety. Some courts, however, distinguish between cases where the time and amount of credit are definite and cases where they are indefinite. In the former contingency notice is not required; in the latter it is;¹¹ but even then the guarantor is discharged by the failure to notify only to the extent he has been prejudiced thereby.¹² Considerations of fairness justify the distinction made. Though to charge the guarantor at his peril is not objectionable where the time and amount are definite, yet where they are indefinite, since giving notice is a very small matter, involving no more than the mailing of a letter¹³ or the like, there is no injustice in imposing this slight burden upon the creditor.¹⁴

² Wald's *Pollock, Contracts*, 3 ed., 22.

³ See *Bishop v. Eaton*, 161 Mass. 496, 500.

⁴ *Oxley v. Young*, 2 H. Bl. 613. Cf. *Mozley v. Tinkler*, 1 C. M. & R. 692.

⁵ *Douglass v. Reynolds*, 7 Pet. (U. S.) 113; *Lee v. Dick*, 10 Pet. (U. S.) 482; *Acme Mfg. Co. v. Reed*, 197 Pa. St. 359. *Contra*, *City Nat'l Bank v. Phelps*, 86 N. Y. 484.

⁶ *Ford, Eaton & Co. v. Harris*, 102 Ky. 169; *Lowry v. Adams*, 22 Vt. 160.

⁷ *Montgomery v. Kellog & Sandusky*, 43 Miss. 486.

⁸ *Lachman v. Block*, 15 So. Rep. (La.) 649; s. c. on rehearing, 47 La. Ann. 505.

⁹ See *Wildes v. Savage*, 1 Story (U. S. C. C.) 22, 33; *Howe v. Nickels*, 22 Me. 175.

¹⁰ *Heyman v. Dooley & Thalheimer*, 77 Md. 162; *Yancey v. Appleton*, 3 Sneed (Tenn.) 89.

¹¹ *Taussig v. Reid*, 145 Ill. 488; *Hungerford v. O'Brein*, 37 Minn. 306.

¹² *Brackett v. Rich*, 23 Minn. 485; *March v. Putney*, 56 N. H. 34.

¹³ *Bishop v. Eaton*, *supra*.

¹⁴ See 15 HARV. L. REV. 65.

RIGHT TO APPROPRIATE MINERALS IN SOLUTION.—The right of the owner of the soil to the beneficial use of percolating waters is well established. Thus, in the course of mining operations on his own land he may drain off all the percolating waters, though he thereby causes his neighbor's well to become dry.¹ And even if by withdrawing the support of such water he causes adjoining land to subside, he incurs no liability.² But when the support withdrawn, though liquid, is not mere water, the question is of greater difficulty. The adjoining landowner has been allowed to recover when the subsidence was due to the withdrawal of quicksand³ or of wet running silt,⁴ on the ground that these substances differed so materially from water that the rules governing percolating waters had no application.⁴ And a similar result was reached in a case where pitch was thus won from the land of another.⁵ On the other hand, a recent English decision has refused relief in a case where the defendant was pumping from his own mine brine which contained salt of the plaintiff's dissolved by water in the latter's mine. *The Salt Union, Ltd. v. Brunner, Mond & Co.*, [1906] 2 K. B. 822. The court distinguished this from the previous cases, partly on the ground that no question of support was here involved, and partly because brine was more analogous to water than quicksand or silt. But these distinctions are not very helpful. If the withdrawal of support in cases of percolating waters gives no cause of action, it would seem clear that the question of support is not what determines liability. And since this ground for distinction fails, the only difference must be in the degree of similarity which the substances respectively bear to water. A much more satisfactory test, however, is found in the American cases, which regard simply the fluidity of the substance. Consequently, no action has been allowed against a landowner who abstracted natural gas⁶ or petroleum⁷ from his land, although he thereby reduced the amount available to his neighbor.

Correlative rights in percolating waters are denied on the broad grounds of public policy.⁸ To apply any set of rules, such as govern surface waters in defined streams, to the case of underground substances of such uncertain and concealed character as those above considered, would not only be difficult and impracticable, but would also too greatly restrict the improvement of land for mining, agricultural, and similar purposes. If a mine-owner must pay damages for any of his neighbor's salt that he might pump up with the brine from his own mine, he would be uncertain of his rights and overcautious in his operations. As a result the public would lose the benefit of the most complete exploiting of mineral resources. Furthermore, if an injunction were to be allowed against one landowner, it must be granted against the other as well, and consequently the salt might be left altogether unused. Whatever the nature of the liquid matter, if in fact it is liquid — using that word in a broad sense, — these considerations apply with equal force.

¹ *Acton v. Blundell*, 12 M. & W. 324.

² *Poppewell v. Hodgkinson*, L. R. 4 Exch. 248.

³ *Cabot v. Kingman*, 166 Mass. 403. See 10 HARV. L. REV. 183.

⁴ *Jordeson v. Sutton, etc., Co.*, [1899] 2 Ch. 217.

⁵ *Trinidad Asphalt Co. v. Ambard*, [1899] A. C. 594. See 13 HARV. L. REV. 299.

⁶ *Hague v. Wheeler*, 157 Pa. St. 324. See 7 HARV. L. REV. 369.

⁷ *Kellog v. The Ohio Oil Co.*, 57 Oh. St. 317.

⁸ See *Frazier v. Brown*, 12 Oh. St. 294, 311.

THE BASIS OF *LIS PENDENS*. — One who acquires any interest in property involved in litigation, *pendente lite* and from a party litigant, is ordinarily bound by the result of the action, even though he was no party thereto and was not heard therein.¹ Both the rule and the general requisites for the application of it are well settled. Thus there can be no *lis pendens* where there is no property which may be affected by the judgment,² or where the property is of such character that it is against public policy to apply the rule, — as with negotiable instruments taken before maturity.³ The *lis* must, moreover, be perfected,⁴ the property adequately described,⁵ and the action closely prosecuted in good faith.⁶

Yet the basis of the rule is involved in controversy. One line of authority speaks of it as an equitable doctrine bottomed on constructive notice;⁷ the other insists that it is based on the principle of *res judicata*,⁸ which is common alike to law and equity. The requisites for a *lis* do not, however, establish either view conclusively, especially since the doctrine is not a favorite with the courts. It may well be urged that, where any requisite is lacking, a purchaser of the property for value and without actual notice should not be held to have constructive notice of the *lis* so as to be bound by it. It may equally be argued that the principle of *res judicata* is not under such circumstances applicable to him. Yet once beyond the fundamentals, the difference in theory may often produce a wide difference in results. Thus the property is affected only by the results of the action in question, and not by collateral claims not litigated therein, even though these be clearly set forth.⁹ By the better rule, also, the courts of a sister state, where the property has been carried and sold *pendente lite*, should effectuate the *lis* under the "full faith and credit" clause of the Constitution.⁹ Clearly neither of these results — and they are but instances — can be explained on the theory of notice, though perfectly consistent with the doctrine of *res judicata*. The rule, therefore, appears to be founded on judicial necessity. If a party, by alienation of the property in controversy during suit, could render recovery by the plaintiff vain, not only would great injustice be done the plaintiff, but there would be an endless series of actions founded upon the same right in the same property. This is manifestly against public policy.

Yet, because the rule is often harsh in operation, those who invoke it should be held strictly to its requirements. This tendency is illustrated by a recent case which held, in foreclosure proceedings, that while a *lis pendens* as against one taking under the defendant dates from the commencement of the action, a cross-bill seeking affirmative relief creates a *lis*, as to one taking under the plaintiff, only from the moment of filing. *Bridger v. Exchange Bank*, 56 S. E. Rep. 97 (Ga.). If it be conceded that the cross-bill is in the nature of a separate suit, — and this seems to be the better

¹ *Thompson v. Baker*, 141 U. S. 648; *Mellen v. Moline, etc., Iron Works*, 131 U. S. 352.

² *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556; *Dovey's Appeal*, 97 Pa. St. 153.

³ *Warren v. Marcy*, 97 U. S. 96.

⁴ *Allison v. Drake*, 145 Ill. 501; *Williamson v. Williams*, 11 Lea (Tenn.) 355.

⁵ *Miller v. Sherry*, 2 Wall. (U. S.) 237.

⁶ *Mann v. Roberts*, 11 Lea (Tenn.) 57; *Sorrell v. Carpenter*, 2 P. Wms. 482.

⁷ *Wortley v. Birkhead*, 2 Ves. Sr. 571; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566.

⁸ *Bellamy v. Sabine*, 1 De G. & J. 566; *Geishaker v. Pancoast*, 57 N. J. Eq. 60.

⁹ *Fletcher v. Ferrel*, 9 Dana (Ky.) 372. *Contra*, *Shelton v. Johnson*, 4 Sneed (Tenn.) 672.

view,¹⁰ — the result attained by the court obviously follows from the *res judicata* theory. A man cannot be bound by the judgment in a suit not yet begun. The same result follows from a strict application of the notice theory, to which the court leaned. But if a broad view of notice be taken, the very existence of the original suit might well be enough to put the purchaser on inquiry and hence bring him within the judgment on the cross-bill. But such a result seems neither just nor desirable.

THE CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL. — Publicity seems to have been an incident of the common law trial by jury,¹ and hence a constitutional guaranty of trial by jury might well have been construed as a guaranty that the trial should be public. However, very generally our constitutions expressly stipulate that one accused of crime shall be accorded a public trial. The opportunities offered for discovering new testimony, the wholesome effect on witnesses, jurors, and officers of the court, and, running through all, the confidence of the community that it knows or can learn what the courts are doing, have been obvious advantages of allowing the public free access to the trial rooms.² On the other hand, such publicity permits spectators to subject themselves to the influences of obscene and vicious testimony.³ The latter consideration has led to a conflict between the necessity of observing the constitutional limitation and the desire to guard the public morals. More or less complete exclusion of spectators during the recital of obscene testimony has been sustained on the ground that it was necessary to preserve order,⁴ to prevent embarrassment of the witness,⁵ or to maintain the dignity of the court.⁶ But the dignity and decorum of the court proceeding must not be more highly regarded than an express constitutional provision. Nor have summary proceedings for contempt proved entirely inadequate to maintain order.⁷ It is evident that the principal object in sustaining such exclusion was to protect the public morals. The courts looked rather at the benefit to the persons excluded than at those necessities of the trial to assure which the constitutional provision was aimed. The current of authority at first seemed to allow practical exclusion,⁸ but a recent Ohio decision, holding illegal a conviction on a trial from which all were excluded except the necessary parties to the trial, members of the bar, and newspaper men, marks a trend of authority⁹ the other way. *State v. Hensley*, 79 N. E. Rep. 462.

¹⁰ *Mansur, etc., Co. v. Beer*, 19 Tex. Civ. App. 311. See 2 Pomeroy, Eq. Jurisp., § 634. *Contra*, *Hall Lumber Co. v. Gustin*, 54 Mich. 624.

¹ *Daubney v. Cooper*, 10 B. & C. 237. See *Lilburne's Trial*, 4 How. St. Tr. 1273; *Fortescue, De Laudibus Legum Angliæ*, Amos' ed., 100; 3 Bl. Comm. 373.

² See 3 Wig., Ev., §§ 1834-1836; 6 Works of Bentham, Bowring's ed., 351.

³ See *Cooley*, Const. Lim., 7 ed., 441; *Beale*, Crim. Plead. and Prac., § 257.

⁴ *Lide v. State*, 133 Ala. 43, 63.

⁵ *Grimmett v. State*, 22 Tex. App. 36.

⁶ *People v. Kerrigan*, 73 Cal. 222.

⁷ See 2 *Bishop*, Crim. Law, 8 ed., § 252.

⁸ *State v. Brooks*, 92 Mo. 542; *Grimmett v. State*, *supra*; *People v. Kerrigan*, *supra*; *State v. Callahan*, 110 N. W. Rep. 342 (Minn.).

⁹ *People v. Murray*, 89 Mich. 276; *People v. Hartman*, 103 Cal. 242 (but *cf.* *People v. Tarbox*, 115 Cal. 57); *People v. Yeager*, 113 Mich. 228. See *Peadon v. State*, 46 Fla. 124, 128.

The question remains as to the degree of control the court may exercise over spectators at a trial without infringing the constitutional requirement. It is doubtless the duty of the court to prevent the admission of so many persons as will physically obstruct the efficient administration of the proceeding.¹⁰ Provided that the court-room has been selected with a view to the reasonable accommodation of the public, it would seem that the attendance could be limited to the seating capacity of the room. But it is conceived that a public trial means more than one which will give the protection of publicity to the trial itself. The traditional idea of the open court is that of one to which the citizen could freely go. Accordingly, the not uncommon practice of locking the doors during the examination of each witness would almost seem a violation of the provision.¹¹ It would seem also that the plan of admission by tickets good for limited periods would necessarily be objectionable to this interpretation of the provision, besides offering a ready opportunity for improper exclusion.¹² The results of an open court, however, are less uniformly desirable under modern conditions. It is worthy of note that the constitutions of a few states do not expressly provide for a public trial,¹³ and that in at least one of these states a statute provides that the trial of certain offenses be held behind closed doors.¹⁴

LICENSE FEES AND FRANCHISE TAXES. — It often becomes necessary to decide whether a so-called license fee is in reality a license, or must be regarded as a tax. It is established that a condition precedent to regarding the imposition as a license is that some privilege be conferred which it was within the power of the state to withhold.¹ Some courts maintain that even so the assessment cannot be regarded as a license if it is more than sufficient to compensate for the cost of issuing the license and of the necessary control over the business.² Other jurisdictions take the opposite view and hold that, so long as a privilege is conferred, it makes no difference how far the return to the state exceeds the cost.³ Still other courts, though ordinarily recognizing the first view, make a distinction in the case of occupations that are not regarded as useful or beneficial, and here the levy is regarded as a license, though the bare cost to the state may be exceeded.⁴ A further modification of the first view is that the incidental expenses incurred by the state because of the granting of the license may be taken into consideration; and under this head would be included the expenses consequent upon increased police service necessitated by the granting of a right to sell liquor.⁵ It is hard to tell, under this reasoning, where to draw the line, for one might keep on finding incidental consequences indefinitely.

It is, in fact, impossible to lay down any hard and fast rule. The nature

¹⁰ *Myers v. State*, 97 Ga. 76, 99.

¹¹ But see *Stone v. People*, 3 Ill. 326.

¹² *Contra*, *Jackson v. Com.*, 100 Ky. 239.

¹³ Massachusetts, New York.

¹⁴ *People v. Hall*, 51 N. Y. App. Div. 57.

¹ *N. Hudson Co. Ry. Co. v. Hoboken*, 41 N. J. L. 71; *Chilvers v. People*, 11 Mich. 43.

² *People v. Jarvis*, 19 N. Y. App. Div. 466; *State v. Angelo*, 71 N. H. 224.

³ *State v. Bixman*, 162 Mo. 1.

⁴ See *State v. Bean*, 91 N. C. 554, 559.

⁵ *Cooley, Taxation*, 3 ed., 1142.

of the business, the convenience or inconvenience to the public caused by granting the privilege, and the cost of issuing the license, together with any cost for the inspection of the business afterwards, are all matters to be considered; but they should rather be regarded merely as evidence to show what the real purpose and intent back of the assessment are. The fundamental consideration in each case must be to determine whether the main object of the levy is regulation or revenue. If it is for the first purpose, it should be regarded as a license, even though a considerable return is netted to the state; and if it is for the second, it should be considered as a tax, even though there may incidentally be some regulation. Examples of the assessment for regulation are the liquor license,⁶ and the theatre license.⁷ An illustration of the second class is a franchise tax upon an ordinary manufacturing corporation, which has recently been held by the United States Supreme Court to be a tax within the section of the Bankruptcy Act giving a preference to a state in the collection of taxes.⁸ *State of New Jersey v. Anderson*, Dec. 10, 1906. In proportion as the need of regulation and the inconvenience to the public caused by carrying on the business may be large, so may the return to the state in the shape of revenue be considerable without the assessment being regarded as an exercise of the taxing power. What might, therefore, be a license under one state of facts, might amount to a tax under another. The hopeless conflict in the cases on this point is seeming rather than real, for the question, as largely one of fact, may be legitimately construed in different ways.

RECENT CASES.

BAILMENTS — BAILOR AND BAILEE — LIABILITY OF SHOPKEEPER FOR PROPERTY OF CUSTOMERS. — The plaintiff called at the defendants' store to purchase a vest. The clerk, being busy, told the plaintiff where the vests were piled, and suggested that he select one and try it on. After the plaintiff had done so he discovered that his own vest was gone. *Held*, that the judgment of the lower court giving the plaintiff the value of the vest and its contents cannot be sustained, since it appears the loss occurred through the negligence of the plaintiff. *Wamser v. Browning, King & Co.*, 36 N. Y. L. J. 1283 (Ct. App., Jan. 8, 1907).

When it is a necessary incident to the business that the customer temporarily lay aside certain property, the shopkeeper impliedly assumes the custody of the goods as a bailee, owing a duty of reasonable care. Thus a customer has recovered for garments laid aside, at the request of the clerk and in his presence, in order that other garments might be tried on. *Bunnell v. Stern*, 122 N. Y. 539; *contra*, *Rea v. Simmons*, 141 Mass. 561. That the presence of the clerk or the express invitation is not always necessary to give recovery is shown by the cases where recovery has been allowed for garments left in a bath house or in a barber shop. *Bird v. Everard*, 23 N. Y. Supp. 1008; *Dilberto v. Harris*, 95 Ga. 571. Of course, if the plaintiff has been guilty of contributory negligence he cannot recover. *Trowbridge v. Schriever*, 5 Daly (N. Y.) 11. In the principal case the absence of the clerk would seem to be important only as tending to show negligence on the part of the plaintiff. And it seems the question of negligence should be left to the jury, and not summarily presumed, as was apparently done here. *Cf. Hunter v. Reed*, 12 Pa. Super. Ct. 112.

⁶ *E. St. Louis v. Trustees of Schools*, 102 Ill. 489.

⁷ *Charity Hospital v. Stickney*, 2 La. Ann. 550.

⁸ § 64 a.

BANKRUPTCY — PREFERENCES — PAYMENT OF SALARY OF OFFICER BY INSOLVENT CORPORATION.—The petitioners sought to have the defendant corporation adjudged bankrupt because the corporation, while insolvent, used part of its assets to pay the salary of its president. *Held*, that the order adjudicating the corporation bankrupt be reversed. *Richmond, etc., Co. v. Allen*, 148 Fed. Rep. 657 (C. C. A., Fourth Circ.).

By the weight of authority the payment of wages to a "workman, clerk, or servant" is not a preference. *Matter of Read*, 7 Am. B. Rep. 111. But a corporation's president is not a "workman, clerk, or servant." *In re Carolina Cooperage Co.*, 96 Fed. Rep. 950. So he must be considered simply as a general creditor in deciding whether he received too large a percentage. An insolvent may transfer property in exchange for a present consideration without giving a preference under § 60 a of the Bankruptcy Act, but not in payment of a debt. *In re Wolf*, 98 Fed. Rep. 84. Strictly the payment of a salary, from its nature, can never be a present exchange; one party, generally the employee, must give credit. It may not be going too far, however, to hold that a man who is paid weekly, for example, hands over a completed week's services at the end of the week, and receives his salary in present exchange. But the payment of a prior week's salary must be considered a preference. So the petitioners, in not proving that the payment was for salary past due, did not show sufficient facts to warrant the order of adjudication.

BANKS AND BANKING — COLLECTIONS — DRAWEE'S RECOVERY AGAINST AGENT COLLECTING CHECK WITH FORGED INDORSEMENT.—The wrongful holder of a check, drawn on the plaintiff, erased the name of the payee, wrote in his own, raised the amount, and deposited the check with the defendant to collect. The defendant received payment from the plaintiff, and the depositor drew out part of the money. Both the defendant and the plaintiff were negligent in not detecting the forgery, though the defendant acted in good faith. The plaintiff sued for the whole amount paid to the defendant. *Held*, that only the amount not yet paid out by the defendant can be recovered. *Union Bank of Canada v. Dominion Bank*, 4 West. L. Rep. 407 (Manitoba, Oct. 22, 1906).

Whether a drawee can recover against the collecting agent of a holder of a raised check, or of a check under a forged indorsement, for payment made to him while acting in good faith, depends on the character of the agency. If the agency was disclosed, payment over by the agent to his principal is a defense. *Nat'l Park Bank v. Seaboard Bank*, 114 N. Y. 28; *United States v. American Exch. Nat'l Bank*, 70 Fed. Rep. 232. If it was undisclosed, payment over is no defense. *Minneapolis Nat'l Bank v. Holyoke Nat'l Bank*, 182 Mass. 130. Here, in not passing on the doubtful character of the defendant's agency, the court neglected the established test for deciding whether recovery should be for only the amount still in the defendant's possession or for the whole sum. Since the agent of an undisclosed principal is liable independently of bad faith in paying over to his principal, negligence in the drawee does not excuse the agent, if negligent also. *Merchants' Bank v. McIntyre*, 2 Sandf. (N. Y.) 431. If the agency was disclosed, such mutual negligence should not, on principle, make the agent liable. The little authority, however, is contrary. *Koontz v. Central Nat'l Bank*, 51 Mo. 275. But this errs in not seeing that the equities being equal, the loss should lie where it falls. See *Continental Nat'l Bank v. Tradesmen's Nat'l Bank*, 55 N. Y. Supp. 545.

BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — GAMBLING DEBTS.—The plaintiff was an innocent purchaser for value before maturity of a negotiable promissory note given in payment of a bet. A Kentucky statute provided that wagering contracts should be void. The Negotiable Instruments Law, since adopted, provided that a holder in due course of an instrument negotiated by a person whose title was defective because of illegal consideration took free from such defect. *Held*, that the former statute is not repealed and that the note is void. *Alexander & Co. v. Hazelrigg*, 24 Bank. L. J. 39 (Ky., Ct. App., Oct. 31, 1906).

Wagering contracts, though not illegal at common law, have become so by statute almost universally. See *Drinkall v. Movius State Bank*, 11 N. D. 10. But an innocent purchaser for value of a note, unenforceable between the immediate parties because of illegality, has always been protected unless the illegality by statute made the note utterly void. See *Sondheim v. Gilbert*, 117 Ind. 71. The former Kentucky statute was construed as having that effect. The law, for commercial reasons, has always inclined toward the protection of an innocent purchaser for value of commercial paper, and it cannot be doubted that the Negotiable Instruments Law was intended to make illegality of consideration a personal and not a real defense. See *Wirt v. Stubblefield*, 17 App. D. C. 283. The Negotiable Instruments Law, then, if fairly construed would seem necessarily to have repealed by implication the prior inconsistent statute. This decision, therefore, does not seem to recognize the spirit of the law which it is interpreting, and must be regarded as a step backward in the development of the law of commercial paper. Wherever the courts have met the point before, they have decided otherwise. *Wirt v. Stubblefield, supra*; cf. *Schlesinger, Receiver v. Kelly*, 114 N. Y. App. Div. 546, 552.

BILLS OF LADING — CLAUSE QUALIFYING STATEMENT OF WEIGHT OF GOODS. — The defendant railway gave a bill of lading for fifty bales of cotton, and relying upon a former bill stated the weight to be nearly double what it was in fact. The bill contained the words "contents and condition of contents of packages unknown." The plaintiff bought the bill and upon discovering the shortage in the cotton sued the railway. *Held*, that the statement of weight is so qualified that the plaintiff cannot recover. *Alabama, etc., Ry. Co. v. Commonwealth Cotton Mfg. Co.*, 42 So. Rep. 406 (Ala.).

Generally, when the agent of a carrier gives a bill of lading for goods not received by the carrier, the agent is said to act openly beyond his authority, so that the carrier is not bound by the bill when in the hands of a *bona fide* purchaser. *Friedlander v. Texas, etc., Ry. Co.*, 130 U. S. 416; see 19 HARV. L. REV. 391. But when a shipment is actually made and only the weight of the goods is misstated, the carrier is more generally bound by the representations of his agent. *Dickerson v. Seelye*, 12 Barb. (N. Y.) 99. Furthermore, an unqualified statement of weight — a fact often ascertainable by the carrier — should import more than a mere opinion. *Relyea v. New Haven Rolling Mill Co.*, 42 Conn. 579. Hence the fact that the goods are described in the bill by bundles as well as by weight should be immaterial. But see *Shepherd v. Naylor*, 5 Gray (Mass.) 591. Of course a clause stating the weight to be unknown would render the statement of weight one of mere opinion. *Shepherd v. Naylor, supra*. But the words "contents of packages unknown" hardly refer to the total weight of a car-load shipment. An Illinois case is opposed to the present decision. *Tibbits v. R. I., etc., Ry. Co.*, 49 Ill. App. 567.

CONFLICT OF LAWS — INTESTATE SUCCESSION — ADVANCEMENTS SET OFF AGAINST ENTIRE ESTATE. — A Virginia intestate had made advances to A, one of his two heirs, for which A had agreed to relinquish his right to share in the estate. The intestate owned realty both in Tennessee, by whose law the agreement was binding, and also in Virginia, where such an agreement was invalid. In Virginia an heir who had received advancements might share in the estate upon bringing his advancements into hotchpot. *Held*, that the value of the Tennessee estate received by the other heir may be set off against and deducted from the advancements received by A, and that A need bring only the balance into hotchpot. *Mort v. Jones*, 54 S. E. Rep. 857 (Va.).

The Virginia policy of enforcing equality between heirs is here attained. But is this decision an undue trespass upon the rule that realty is governed by the law of its situs? It seems not, for the court does not attempt to interfere with the descent of the Tennessee realty. True, it may attain the same end by allowing its own realty to descend only in the manner it prescribes, but its right to prescribe such terms must be unquestioned. The only authority found is, however, a rather distant analogy. In bankruptcy a creditor cannot prove without accounting for a partial payment out of foreign personalty, though the rule is other-

wise with foreign realty. *In re Bugbee*, 9 N. B. R. 258; *Cockerell v. Dickens*, 3 Moore P. C. 98. But it does not follow that the court was without jurisdiction simply because it refused to exercise it. Moreover, there is reason for distinguishing that case from this, in that a creditor never can get more than is due him, and so no great injustice is done; while an heir who gets any more than his share is really getting more than is "due" him.

CONSTITUTIONAL LAW — CONSTRUCTION OF CONSTITUTIONS — POWER OF VICTORIA TO TAX AUSTRALIAN OFFICER. — The respondent, an officer of the Australian Commonwealth, was assessed on his official salary under the Victorian Income Tax Act. He objected that this was beyond the constitutional power of Victoria. *Held*, that the assessment was proper. *Webb v. Outtrim*, [1907] A. C. 81.

This case sets a vexed question at rest. Late Australian cases have held such a tax invalid. *D'Emden v. Pedder*, 1 Com. L. Rep. 91; *Deakin v. Webb*, 1 Com. L. Rep. 585; *contra*, *Wollaston's Case*, 28 Vict. L. Rep. 357. These decisions rested on the likeness between the American and Australian constitutions. The Australian constitution was patterned after that of the United States, and it is the rule when the statutes of one state are copied by another for the courts of the second to follow the construction already placed upon the statutes by the courts of the former. In the United States a state may not tax the salary of a federal officer, since this impedes a federal agency. *Dobbin v. Commissioners of Erie County*, 16 Pet. (U. S.) 435. This really rests on the principle that the creation of two interacting governments impliedly confers on each the power to protect its own existence, and impliedly denies to each power to destroy the other. What acts on the part of either constitute a menace or serious impediment to the other cannot be categorically defined. In the case at hand the court declined to follow the American cases on the ground that the two constitutions are not enough alike to warrant similar interpretations upon this point. Probably this simply means that it does not consider this species of tax a sufficient impediment or menace. See, further, 18 HARV. L. REV. 559.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — COMPELLING RAILROAD TO BUILD SIDE-TRACKS. — A statute required railroads, on application, to condemn a right of way and build spurs to the premises of any industrial concern not more than a half mile away. The cost was to be borne in the first instance by the industrial concern, but to be repaid by the railroad in annual instalments. The act was silent as to a right in the public to use the spur. The defendant refused to build a spur to the plaintiff's brick-yard. *Held*, that the statute is unconstitutional, because it authorizes the taking of property for a private use. *Mays v. Seaboard Air Line Ry.*, 75 S. C. 455.

The power of eminent domain can be exercised only for public purposes. While the decision of the legislature may be final as to whether there is necessity for the work, the question whether it is in its nature public or private is necessarily judicial. *Matter of Deansville Cemetery Ass'n*, 66 N. Y. 569. A few states, notably Pennsylvania, have gone far in sustaining statutes allowing the condemnation of land for private roads connecting with railways or canals. *Shoenberger v. Mulhollan*, 8 Pa. St. 134. If this extreme position is tenable, it is because the public has a genuine interest in the industry in question. In the case of coal mines and in a few other instances this may, perhaps, be granted, but a brick-yard, as here, cannot be admitted to be within this exceptional class. *C. & E. I. Ry. v. Wiltze*, 116 Ill. 449. Aside from its attempted grant of the power of eminent domain, the statute also violates both the constitution of South Carolina and the Fourteenth Amendment, because it takes the railway's property for private use in requiring it to build the spur at its own expense. *Mo. Pac. Ry. v. Nebraska*, 164 U. S. 403.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — VALIDITY OF STATUTORY REQUIREMENT FOR MAINTENANCE OF SUIT. — The charter of a municipality provided that no action should be maintained against it for personal

injury caused by snow and ice upon its streets, unless written notice of these conditions had been given before the injury. *Held*, that this provision is not in violation of the constitutional guaranty against the deprivation of life, liberty, or property, without due process of law. *MacMullen v. City of Middletown*, 79 N. E. Rep. 863 (N. Y.).

For a criticism of the decision in the lower court, here reversed, see 19 HARV. L. REV. 618.

CONSTITUTIONAL LAW — OPERATION OF CONSTITUTIONS — STATUTE UNCONSTITUTIONAL IN PART. — A statute provided that no county should tax at more than a certain per cent, but counties A and B were excepted. The state asked a writ of *mandamus* to prohibit county C from taxing in excess of this rate. *Held*, that the writ be granted, for though the exception of counties A and B is unconstitutional, yet the rest of the statute is not therefore invalid, since the exception can be struck out. *State ex rel. Dillon v. Braxton County Court*, 55 S. E. Rep. 382 (W. Va., Ct. App.).

That part of a statute may be valid and part invalid is well settled. But the cases seem to offer two somewhat contrary tests to determine when the part not struck out should stand alone. One is that it must conform to what was the legislature's intent in passing it. The other is that, though by itself it does not so conform, it is nevertheless valid if the court thinks that the legislature would have passed it alone rather than not have had it at all. The former test is supported by most authority on actual decisions, though the language commonly used confuses the two. *Sprague v. Thompson*, 118 U. S. 90; *Burkholtz v. State*, 16 Lea (Tenn.) 71. The latter, illustrated by the principal case, has some precedents, which do not seem to consider the grave danger of judicial legislation in a court undertaking to say what a legislature would have done. *People v. Knopf*, 183 Ill. 410, 422; *State v. Baker*, 55 Oh. St. 1. The present decision extends the legislature's intent beyond the limit it expressly set. That a contrary decision would invalidate a whole system of taxation would be unfortunate, but not a justification for this result. *State v. Supervisors*, 62 Wis. 376.

CONSTITUTIONAL LAW — TRIAL BY JURY — RIGHT TO PUBLIC TRIAL. — During the recital of immoral and obscene testimony the trial judge excluded from the court-room all persons except the defendant and one of his witnesses, the jury, officers of the court, members of the bar, and newspaper men. *Held*, that the defendant's constitutional right to a public trial has been violated. *State v. Hensley*, 79 N. E. Rep. 462 (Oh.). See NOTES, p. 489.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — INJUNCTION BY MINORITY STOCKHOLDER AGAINST SALE OF STOCK TO ANOTHER CORPORATION. — A telephone company, in pursuance of an unlawful plan to create a monopoly, bought up a majority of the shares of a competing corporation. A stockholder in the second corporation filed a bill against both corporations, seeking to restrain the transfer of the stock on the books of his own corporation, and also the voting on such stock by the purchaser. *Held*, that the prayer of the bill be granted. *Dunbar v. American Tel. and Tel. Co.*, 79 N. E. Rep. 423 (Ill.).

Any purchase by one corporation of stock in another to restrain trade is universally held *ultra vires* of the buyer. Thus in the present case a stockholder of the buying corporation would have been granted equitable relief. *Farmers' Loan and Trust Co. v. N. Y., etc., R. R.*, 150 N. Y. 410. And where, as here, the purchase achieves an illegal result, the corporation whose stock is held, equally with the corporation holding, may be dissolved by the state. *People v. North River, etc., Co.*, 121 N. Y. 582. Thus the stockholder of the selling corporation has a lively interest, which equity here recognizes, in preventing such a possibility. *Harding v. American Glucose Co.*, 182 Ill. 551. If, however, the holding, though *ultra vires*, is not illegal, the state will not dissolve the corporation whose stock is held, and so the mere purchase should not be ground for equitable relief. *Milbank v. N. Y., etc., R. R. Co.*, 64 How.

Prac. (N. Y.) 20. But if the buying corporation attempts to vote on the stock, the tendency of its vote is manifestly to favor its own plans even at the expense of the other, and a stockholder of the latter should be allowed to enjoin the voting. *Milbank v. N. Y., etc., R. R. Co.*, *supra*; but see *Oelbermann v. N. Y., etc., R. R.*, 27 N. Y. Supp. 945; *aff.* 29 N. Y. Supp. 545.

COURTS — PLEA THAT COURT NOT LEGALLY ORGANIZED. — In the court below the defendant filed "a plea to the jurisdiction of the court," alleging that "this court is without lawful constitution" since the commission to the judge was invalidly issued. *Held*, that the lower court was correct in overruling the plea. *State v. Hall*, 55 S. E. Rep. 806 (N. C.).

This decision is put upon the ground that "no court can pass upon the validity of its own constitution and organization." It is reasoned that the defendant has called upon the lower court to exercise a judicial function in denying its own existence, whereas by the nature of his plea he avers that, having no existence in law, it has no such function. See *Beard v. Cameron*, 3 Murph. (N. C.) 181; *cf. Koehler and Lange v. Hill*, 60 Ia. 543, 603. This philosophy seems rather extraordinary. Logically applied it produces the result that the invalidity of the highest court in any jurisdiction, be it never so unquestionable, can in no way be judicially adjudged. The fallacy in the reasoning is, of course, apparent: while the invalidity of the judge's commission may prevent his constituting a *de jure* court, he forms, at least, a *de facto* court. See *State v. Lewis*, 107 N. C. 967. Obviously nothing in *rerum natura* prevents such a court's passing on its own validity as on other questions. The result of the present decision, however, seems quite correct; for the law is apparently settled that the authority of a *de facto* judge cannot be attacked collaterally. *Clark v. Commonwealth*, 29 Pa. St. 129; *In re Manning*, 139 U. S. 504.

CRIMINAL LAW — FORMER JEOPARDY — IMMATERIAL VARIANCE. — In a former trial the defendant asked for a direction for acquittal on the ground of a variance. The judge, erroneously believing the variance material, directed the acquittal. *Held*, that the defendant was once in jeopardy and cannot be tried again for the same offense. *Drake v. Commonwealth*, 96 S. W. Rep. 580 (Ky.).

As the proof offered to support the second indictment would have supported a conviction under the first, the defendant was technically in double jeopardy. See 1 BISHOP, CRIM. LAW, § 1052. But a defendant by his acts may put himself in such a position that he will not be allowed to set up his former jeopardy. Thus, although a defendant has been tried under a valid indictment, if by his motion the indictment is quashed or an acquittal directed because of a supposed defect in the indictment, he is not allowed to plead that jeopardy as a bar to another trial for the same offense. *United States v. Jones*, 31 Fed. Rep. 725; *cf. People v. Casborus*, 13 Johns. (N. Y.) 351. It seems that the same result should follow when at the defendant's request the judge directs an acquittal because of an alleged but non-existent material variance. *People v. Meakim*, 61 Hun (N. Y.) 327; *Carroll v. State*, 98 S. W. Rep. 859 (Tex.); *contra, People v. Terrill*, 132 Cal. 497. In both situations the actual jeopardy was ended by a ruling made at the defendant's request for causes which if true would have rendered the first trial no bar to another trial on a correct indictment. The refusal to allow this former jeopardy to be pleaded is based on estoppel or, more properly, waiver.

EASEMENTS — SEVERANCE AND TRANSFER OF RIGHT — RESERVATION BY GRANTOR OF DOMINANT TENEMENT OF RIGHT OF ACTION FOR INFRINGEMENTS. — The owner of the fee, after instituting an action against the defendant for the infringement of easements appurtenant by permanent structures, sold the fee, reserving this right of action. Therein she subsequently recovered fee damages. After several mesne conveyances with similar reservations, the plaintiff, knowing all the facts, purchased the fee; but whether before or after the defendant's payment of fee damages did not appear. *Held*, that the plaintiff cannot maintain action against the defendant for the infringement of the easements. *Friedman v. New York, etc., R. R. Co.*, 52 N. Y. Misc. 20.

Logically following the New York doctrine in this sort of easement case, the court denied the plaintiff a right of action because he would be obliged to hold any sums which he might be allowed to recover, as trustee for the original grantor, and in this case that *cestui* had already received all to which he was entitled. See 20 HARV. L. REV. 136. If the comments on this doctrine, made in the note just cited, be sound, a more natural solution of the problem in cases where, as here, the parties do not attempt to reserve to the grantor the easement itself, but merely intend that he shall have the privilege of suing for infringements thereof, seems found in construing the words of reservation, whenever possible, as an agreement by the grantee as owner of the dominant tenement to give the grantor a power of attorney to sue for the infringements for his own benefit. Subsequent purchasers of the land with notice of the agreement would then be held bound in equity to give a similar power of attorney; and the payment of permanent fee damages to the original grantor would extinguish the easement.

ELECTIONS — QUALIFICATION OF VOTERS — INMATES OF NATIONAL SOLDIERS' HOMES. — Congress created a corporation the object of which was to erect and maintain national soldiers' homes. The board of managers were to be government officers and appointees, and the necessary funds were to be supplied from the United States Treasury. The corporation purchased land and the state legislature ceded jurisdiction over the land to the United States, with a proviso that the inmates of the home should not be denied the right to vote. *Held*, that the inmates are not residents of the state, and therefore under the state constitution are not entitled to vote. *State v. Willet*, 97 S. W. Rep. 299 (Tenn.).

Land purchased by the United States with the consent of the state for the erection of forts, dockyards, and other needful buildings, as provided by the Constitution, is under the exclusive jurisdiction of the federal government, and persons residing on it do not acquire a local residence. See *Ft. Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525. Cases like the present have, however, been distinguished because soldiers' homes are not "needful buildings" and because the land is held in the name of the corporation. For these reasons a statute ceding jurisdiction has been construed as giving merely concurrent jurisdiction. *In re Kelly*, 71 Fed. Rep. 545. Under this construction an inmate of a soldiers' home might properly acquire local citizenship. But as soldiers' homes are incidental to the war power, and as the difference in title does not affect the use to which the land is to be put, that construction seems unsound. *Sinks v. Reese*, 19 Oh. St. 306; *Foley v. Schriver*, 81 Va. 568. But even granting that the land be within state jurisdiction, it is very seldom that persons living at a charitable home have the requisite intent to acquire residence where such institution is located. *Silvey v. Lindsay*, 107 N. Y. 55.

EMINENT DOMAIN — WHEN PROPERTY TAKEN — POLLUTION OF NAVIGABLE STREAM. — A canal company, operating under the right of eminent domain, constructed a canal for navigation purposes from the sea to a fresh water navigable stream which the plaintiff, an upper riparian proprietor, used for irrigation. The canal caused the salt water to flow in with the tide, and as a result of the use of this water the plaintiff's crops were destroyed. *Held*, that the sovereign rights of the state are no bar to the plaintiff's recovery. *Bigham Bros. v. Port Arthur Canal & Dock Co.*, 97 S. W. Rep. 686 (Tex., Sup. Ct.).

The common law rule that the sovereign owns the soil of navigable waters has long been recognized. Riparian rights on navigable streams are, however, so variant in different localities, that they are said to be governed by local law. See *Shively v. Bowlby*, 152 U. S. 1; 18 HARV. L. REV. 341. Consequently authorities conflict as to whether damages are recoverable for injurious affections of tide waters caused by those acting under the right of eminent domain. See 14 HARV. L. REV. 158. Some courts, denying recovery in such cases, allow it to owners above the point of navigability. *Simmons v. Mayor of Paterson*, 60 N. J. Eq. 385. This is illogical and theoretically wrong. The real reason for riparian rights is the contiguity of land and stream, not unity of ownership.

See *Lyon v. Fishmonger's Company*, L. R. 1 App. Cas. 662. By the better authority the riparian owner has a right to use waters of navigable and non-navigable streams alike, so far as is consistent with the sovereign ownership of soil beneath the navigable water. He has a property right to have the waters flow as usual, unpolluted by back-water or tide, and may recover for a violation of this right. *Morrill v. St. Anthony Falls Water Power Co.*, 26 Minn. 222; see *Barret v. Metcalf*, 12 Tex. Civ. App. 247.

EQUITABLE ELECTION — GIFT BY DEVISEE TO HEIR. — A testatrix, who held a half interest with her husband, devised her interest to him. He conveyed parcels of the estate to the children and heirs of the testatrix. After his death they petitioned to have the will of their mother set aside. The defendants contended that the children, having accepted these gifts, were estopped from maintaining the invalidity of the will. *Held*, that the doctrine of equitable election is not applicable. *Holland v. Coutts*, 98 S. W. Rep. 236 (Tex., Sup. Ct.).

When a testator leaves property to A and at the same time leaves some of A's property to B, then A, if with knowledge of the devise to B he accepts the benefits under the will, is by the doctrine of equitable election precluded from defeating the will by claiming his property which was left to B. *Stratfield v. Stratfield*, Cas. t. Talb. 176. The doctrine is put on the ground of an implied condition to this effect. *Noys v. Mordaunt*, 2 Vern. 581. This rule has also been applied to deeds. *Bigland v. Huddleston*, 3 Bro. Ch. *285 n. But in the present case there was no such election under the will, for by that instrument the petitioners took nothing. That they are estopped, by their acceptance of the conveyance to them by their father of land that he received under the will, seems to be impossible in view of the fact that they now make no claim under that conveyance. Under the deed the doctrine of election is inapplicable, for that instrument presented no alternative rights, and so no opportunity for election. *Fifield v. Van Wyck*, 94 Va. 557.

EVIDENCE — RES GESTÆ — PROXIMITY OF TIME. — The plaintiff's intestate, having been injured and rendered unconscious through the alleged negligence of the defendant, made certain statements as to how the accident happened immediately after regaining consciousness. *Held*, that such statements are admissible as part of the *res gestæ*. *Christopherson v. C., M. & St. P. Ry. Co.*, 109 N. W. Rep. 1077 (Ia.).

The reason for the rule admitting the contemporaneous statements of the injured party or an eye-witness lies, it is believed, in the great probability of their being true. *State v. Wagner*, 61 Me. 178. This probability arises from the mental or bodily disturbance caused by the accident, which is supposed to deprive the person of his power of fabrication. See *Mitchum v. State*, 11 Ga. 615. The necessity of absolute contemporaneousness is in dispute. The line of authority demanding it proceeds on the reason that statements not absolutely contemporaneous are not part of the *res gestæ*, but are purely narrative. *Reg. v. Bedingfield*, 14 Cox C. C. 341; *Waldele v. N. Y., etc., Co.*, 95 N. Y. 274. Another line of authority admits statements made shortly after an accident, although clearly narrative, if the test of probability of truth is satisfied. *Insurance Co. v. Mosley*, 8 Wall. (U. S.) 397. The latter view, though less convenient to apply than the stricter doctrine, seems preferable. The statements may be equally true whether made at the time of the accident, or, as the present case well shows, made some time after but before the presumption of possible fabrication arises. *Hill v. Commonwealth*, 2 Grat. (Va.) 594; but see 14 HARV. L. REV. 230.

INSURANCE — MUTUAL BENEFIT INSURANCE — DIVORCE OF BENEFICIARY. — A statute governing fraternal beneficiary associations confined payments of death benefits to the family, heirs, etc., of the members. The constitution of one of these associations limited payments in the same way. A member named his wife as beneficiary, and if she should die his representatives were to take in trust for his heirs. The wife became divorced. *Held*,

that the representatives take in trust for the heirs. *Brotherhood of Railroad Trainmen v. Taylor*, 9 Oh. Circ. Ct. Rep. (N. S.) 17.

In ordinary life insurance the contract is embodied in the policy, and, the beneficiary's rights being vested, a divorce does not affect them. *Overhiser v. Overhiser*, 63 Oh. St. 77. In mutual benefit society insurance the laws of the society are part of the contract, and, these laws being subject to change, the beneficiary's rights vest only on the death of the insured. See *Holland v. Taylor*, 111 Ind. 121. Till then they are a mere expectancy, divested at his will. *Masonic, etc., Ass'n v. Bunch*, 109 Mo. 560. So even where a member dies without having revoked a provision in favor of a wife since divorced, the latter should receive no benefit, for at the time the right would vest she is no longer within the favored class of relatives. *Order of Railway Conductors v. Koster*, 55 Mo. App. 186. Apparently conflicting decisions on this point are generally accounted for by variations in the constitutions and by-laws of the different societies. For example, some courts reach a result opposite to that of the principal case because of the absence of an express limitation on payment, the wife being a proper beneficiary when appointed. *Courtois v. Grand Lodge*, 135 Cal. 552. The case under discussion is clearly correct, even without the aid of the statute.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — FEDERAL EMPLOYERS' LIABILITY ACT. — The Act of Congress of June 11, 1906, c. 3073, 34 Stat. at L. 232, 233, provided that "every common carrier engaged in trade or commerce . . . between the several states . . . shall be liable to any of its employees or in case of his death to his personal representative . . . for all damages which may result from the negligence of any of its officers, agents, or employees . . ." Held, that the statute is unconstitutional. *Brooks v. Southern Pac. Co.*, 148 Fed. Rep. 986 (Circ. Ct., W. D. Ky.); *Howard v. Illinois Cent. R. R. Co.*, 148 Fed. Rep. 997 (Circ. Ct., W. D. Tenn., W. D.). See NOTES, p. 481.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — NATIONAL ARBITRATION ACT. — The Act of Congress of June 1, 1898, c. 370, § 10, provided that any common carrier engaged in interstate commerce, or any agent thereof, who "shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership" in a labor organization "is hereby declared to be guilty of a misdemeanor." Held, that the statute is unconstitutional. *United States v. Scott*, 148 Fed. Rep. 431 (Dist. Ct., W. D. Ky.).

The decision is expressly rested on two grounds: first, that the Act is not a regulation of "commerce among the several states" within the meaning of the Constitution; secondly, that at all events the Act by its terms also applies indiscriminately and inseparably to purely intrastate commerce. The very same considerations that determine the validity of the Federal Employers' Liability Act must furnish the criteria by which to judge the constitutionality of the act now in question. See NOTES, p. 481. These criteria seem to show the latter as well as the former act to be unsanctioned by the interstate commerce powers of Congress. While regulating the relations between employers and employees engaged in interstate commerce, § 10 of the National Arbitration Act seems to react in no appreciable manner as a regulation of interstate traffic or intercourse. The object of this section, as well as its result, appears to be the promotion of the welfare, not of interstate transportation or transit or traffic, but of union labor.

LEGACIES AND DEVISES — VOID OR VOIDABLE BEQUESTS AND DEVISES — EFFECT OF LAPSE ON EXECUTORY GIFTS OTHERWISE ILLEGAL. — A testator bequeathed \$1500 on a dry trust for his brother, and directed that any of it remaining at his brother's death be divided between two nieces. There was a residuary clause, immediately followed by another which directed that, if any one entitled to a share in the estate should die before being paid, his share should go into the residue. The brother predeceased the testator. Held, that

the \$1500 goes to the residuary legatees. *Young v. Robinson*, 99 S. W. Rep. 20 (Mo., K. C. Ct. App.). See NOTES, p. 483.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — DICTATION TO STENOGRAPHER AND TRANSMISSION BY CABLE. — To transmit privileged defamatory information concerning the plaintiff to an interested party in a foreign country, the defendant dictated a letter to a stenographer, who typewrote and copied it. The defendant also sent a defamatory cablegram in a code which could readily be interpreted. *Held*, that, the communication being privileged, such publications are not actionable. *Edmondson v. Birch & Co. & Horner*, 23 T. L. R. 234 (Eng., Ct. App., Jan. 14, 1907).

Whether considered as libel or slander, the dictation of unprivileged defamatory matter to a stenographer, being a communication to a third person, is a publication, and actionable. *Gambrell v. Schooley*, 93 Md. 48. So is a defamatory message written and delivered to a telegraph company for transmission. *Monson v. Lathrop*, 96 Wis. 386. Nor should business demands justify a different result. See *Pullman v. Hill & Co.*, [1891] 1 Q. B. 524. When, however, the publication to third persons is subsidiary to the communication of privileged information, the mere fact of publication should not, in the absence of bad motive, beget an action. For when the writing and the transmission of the privileged defamatory words are reasonably necessary means of making the communication, the privilege should be extended. Under these circumstances, accordingly, it has been held that publication to a copyist is privileged. *Harper v. Hamilton, etc.*, *Ass'n*, 32 Ont. 295. Similarly, transmission by telegraph or cable should be privileged. See *Robinson v. Jones*, 4 L. R. Ir. 391, 396; *cf. Williamson v. Freer*, L. R. 9 C. P. 393. And, in cases where the privileged matter is to be communicated to numerous interested persons, the protection of the privilege covers even printing and circulation in pamphlet form. *Gattis v. Kilgo*, 52 S. E. Rep. 249 (N. C.).

LIS PENDENS — NATURE AND SCOPE — BASIS OF RULE. — During proceedings to foreclose a mortgage the intervening plaintiff purchased the property at an execution sale for value and without actual notice. Subsequently the mortgagee filed a cross-bill to have the mortgage cancelled, claiming a *lis pendens* from the beginning of the foreclosure proceedings. *Held*, that the *lis pendens* relative to a cross-bill seeking affirmative relief dates, as against one taking under the plaintiff, from the filing of the cross-bill. *Bridger v. Exchange Bank*, 56 S. E. Rep. 97 (Ga.). See NOTES, p. 488.

MALICIOUS PROSECUTION — PROBABLE CAUSE — CONTINUING PROSECUTION AFTER KNOWLEDGE OF INNOCENCE. — In a suit for malicious prosecution the court charged that if when the defendants instituted the prosecution they were justified in believing that the accused was guilty, but "if they continued to prosecute it after they had learned that he was not guilty of the charge, or that they had no reason to believe he was guilty of the charge, then the action was without probable cause." *Held*, that the inquiry as to probable cause relates to the time when the prosecution was commenced, and that the charge was erroneous. *Hantman v. Hedden*, 31 Pa. Super. Ct. 564.

It has been said that one should be liable who maliciously continues without probable cause a prosecution which another has begun. See *Weston v. Bee-man*, 27 L. J. Exch. 57. But in the case under discussion it was the same person who continued it. The court relied upon the fact that a criminal prosecution is usually conducted by the state's attorney, and that the prosecuting witness has no control. But usually the latter exercises a very real control, and if he urges on the prosecution after ceasing to have probable cause he should be liable. *Blunk v. A. T. & S. F. Ry.*, 38 Fed. Rep. 311. Existing authority reaches a different result when he merely lets the law take its course. *Swain v. Stafford*, 26 N. C. 392; *Scheibel v. Fairbain*, 1 B. & P. 388. But it seems arguable that he owes a duty when he discovers his error to do what he reasonably can to stop the prosecution. *Cf. Davies v. London, etc., Ins. Co.*, 8 Ch. D. 469. In civil suits, however, the complainant has control of the prosecution,

and clearly should not continue without probable cause. But in all cases evidence that probable cause no longer existed should be strong. The evidence offered by the defendant in the first suit cannot be sufficient. *Wetmore v. Mellinger*, 14 N. W. Rep. 722 (Ia.).

PHYSICIANS AND SURGEONS — NECESSITY OF PATIENT'S CONSENT TO OPERATION. — A surgeon, by telling his patient that a very slight operation was necessary, induced her to take ether and removed her uterus. *Held*, that the patient may recover exemplary damages. *Pratt v. Davis*, 224 Ill. 300.

For a discussion of this case in a lower court, see 18 HARV. L. REV. 624.

POWERS — GENERAL POWERS — NATURE OF EXECUTOR'S TITLE WHEN APPOINTMENT BY WILL. — By the Finance Act of 1894, § 9 (1), estate duty on property which passes to the executor as such is payable out of the residue, whereas estate duty on property not passing to the executor as such is a first charge on the specific property. D, having a general power of appointment over the equitable interest in personality, exercised it by will. *Held*, that the appointed property does not pass to the executor *qua* executor, and that the duty is payable out of the appointed property. *Re Dodson*, 51 Sol. J. 230 (Eng., Ch. D., Jan. 22, 1907).

For favorable comment upon a contrary holding on this controverted point, see 16 HARV. L. REV. 376.

RAILROADS — TITLE TO RIGHT OF WAY — USER BY TELEPHONE COMPANY AS ADDITIONAL SERVITUDE. — By condemnation proceedings a railway company acquired the right "to enter upon and occupy" the plaintiff's land for railway purposes. Later the company granted to the defendant the privilege of erecting poles and wires on its right of way for purposes not primarily concerning the railway business. *Held*, that the plaintiff may maintain trespass against the defendant telephone company. *Pittock v. Central District and Printing Telegraph Co.*, 31 Pa. Super. Ct. 589.

In construing the nature of the estate or interest condemned by railways under the various eminent domain statutes, the American courts arrive at three different results: (1) that the right acquired is an absolute fee; (2) that it is a fee conditioned on the continuance of the user, with a reversionary interest over on abandonment; and (3) that it is essentially like an easement in gross. *Prather v. W. U. Tel. Co.*, 89 Ind. 501; *Currie v. N. Y. Transit Co.*, 66 N. J. Eq. 313; *P., F. W., etc., Ry. v. Peet*, 152 Pa. St. 488. Confusion results when the second and third theories are not distinguished, and especially when the attempt is made to deduce the nature of the right *a priori*, instead of interpreting the statutes. If the language of the statute is general, as in the present case, the right condemned should be limited to the requirements of the railway. *Newton v. Perry*, 163 Mass. 319. For the exercise of the right of eminent domain is in derogation of private rights and should be strictly construed. *Lonce's Appeal*, 55 Pa. St. 16. Therefore, a right broadly analogous to an easement in gross being sufficient to permit the railway to carry on its business, the court in the case at hand properly allowed the plaintiff, as owner of the fee, to maintain trespass. *Cf. Hodges v. W. U. Tel. Co.*, 133 N. C. 225.

SET-OFF AND COUNTERCLAIM — COUNTERCLAIM AS WAIVING OBJECTION TO JURISDICTION. — A motion to quash a return of service was overruled. The defendants, after excepting, appeared as ordered and pleaded a counterclaim for damages under the contract upon which suit was brought. *Held*, that the defendants waived their right to question the jurisdiction by pleading a counterclaim. *Merchants' Heat and Light Co. v. James B. Clow and Sons*, U. S. Sup. Ct., Jan. 28, 1907.

In general, an appearance for any other purpose than to question the jurisdiction of the court gives personal jurisdiction over the defendant. *Reed v. Chilson*, 142 N. Y. 152. The better view, however, seems to admit the exception to this rule that where an objection to the jurisdiction has been erroneously overruled, it is not waived by a subsequent plea to the merits. *Southern Pacific Co. v. Denton*, 146 U. S. 202; *contra, Stevens v. Harris*, 99 Mich. 230. Other-

wise the defendant would be forced to submit to the jurisdiction or entirely to forego his right to contest the merits of the plaintiff's claim. No such severe alternative is forced upon him by refusing to extend the exception to a counterclaim pleaded after unsuccessful objection to the jurisdiction, for he is at liberty to leave the determination of the controversy involved therein to a subsequent action. *Quick v. Lemon*, 105 Ill. 578. By his counterclaim the defendant invoked the positive aid of the court in a transaction which might have been made an independent cause of action, and thereby assumed the position of a plaintiff. Such a stand seems inconsistent with the contention that the court does not have personal jurisdiction. *Farmer v. Nat'l Life Ass'n*, 138 N. Y. 265.

STATUTES — INTERPRETATION — EFFECT OF SPECIAL SAVING CLAUSE ON GENERAL SAVING STATUTE. — The defendant was indicted for paying rebates in violation of the first section of the Elkins Act, which had been superseded by the Hepburn Act. The offenses were committed prior to the enactment of the latter. An express saving clause in the Hepburn Act mentions only pending causes, but § 13 of the U. S. Revised Statutes provides that "the repeal of any statute shall not have the effect to release any penalty incurred under such statute unless the repealing act shall so expressly provide." *Held*, that the indictment is valid. *United States v. D. L. & W. R. R. Co.*, U. S. Circ. Ct., S. D. N. Y., Feb. 14, 1907.

It has been held that the existence of an express saving clause mentioning only pending causes of action declares by implication that no other causes based on the repealed act may be prosecuted, a general saving statute notwithstanding. *State v. Showers*, 34 Kan. 269. The reason assigned is that otherwise the special saving clause would add nothing to a general saving statute, while the law seeks to give force and effect to every word and clause in an act. See *Opinion of Justices*, 22 Pick. (Mass.) 571. But it is hard to believe that Congress intended that all unprosecuted violators of the Elkins Act should be immune from punishment. Further, the general saving statute has provided that in the absence of express contrary legislation, offenders against repealed acts might be punished. The Hepburn Act contains no express provision to the contrary; hence the general saving statute must be applied unless it is repealed by implication. But repeal by implication is looked upon with disfavor, and express legislation must control in the absence of subsequent legislation equally express. *Rosencrans v. United States*, 165 U. S. 257. This sound doctrine justifies the refusal of the court to recognize an implication opposed to the furtherance of justice, though the result be to stultify the special saving clause.

SURETYSHIP — DEFENSE OF OMISSIONS OF CREDITOR — CREDITOR'S FAILURE TO PROVE IN BANKRUPTCY. — The plaintiffs were indorsees and the defendants indorsers of a promissory note. The maker of the note became bankrupt, and the plaintiffs, having neglected to prove their claim against the estate in bankruptcy, wished to recover their whole loss from the indorsers. *Held*, that they can recover only the difference between the amount due on the note and the *pro rata* dividend they would have received had they proved in bankruptcy. *Second Nat'l Bank v. Prewett*, 96 S. W. Rep. 334 (Tenn.).

It is fundamental in suretyship law that a creditor, as regards the surety, owes in general no duty of affirmative action against the principal debtor. Thus, by the weight of authority, a creditor retains unimpaired his right against the surety, though his own delay has defeated his claim against the estate of a deceased principal. *Sibley v. McAllaster*, 8 N. H. 389; *contra*, *Siebert v. Quesnel*, 65 Minn. 107. So a creditor's failure to exercise his privilege of participating in insolvency proceedings will leave intact his right against the surety. *Scholt v. Youree*, 142 Ill. 233. The present decision, therefore, is against the decided weight of authority in these analogous cases, as well as in the few cases where the same situation has arisen in connection with bankruptcy proceedings. *Clopton v. Spratt*, 52 Miss. 251. The general rule first stated is not without exception, however. When the affirmative act called for is trivial, and the injury to the surety consequent upon its omission great, the creditor's failure to act

has been held to relieve the surety. *Sullivan v. State*, 59 Ark. 47. But proof in bankruptcy involves possibilities too onerous to bring it within this exception.

SURETYSHIP — DEFENSE OF OMISSIONS OF CREDITOR — NECESSITY OF NOTICE TO GUARANTOR OF ACCEPTANCE. — At the plaintiff's request the defendant wrote to him a letter guaranteeing payment for any goods A might purchase of him. Goods were then furnished to A by the plaintiff. The defendant's relations with A were such as should have kept him informed as to the transactions between A and the plaintiff. On A's failure to pay the purchase price the plaintiff sought to hold the defendant. *Held*, that lack of notice of acceptance of the defendant's guaranty is no bar to recovery. *Drucker v. Heyl-Dia*, 52 N. Y. Misc. 142. See NOTES, p. 485.

SURETYSHIP — DEFENSE OF SUSPENSION OF PRINCIPAL OBLIGATION — FRAUDULENT PREFERENCE TO CREDITOR. — The defendant, with knowledge of the insolvency of the maker of a note, accepted payment. Within four months the maker was adjudicated a bankrupt, and the plaintiff, the trustee in bankruptcy, recovered the payment. *Held*, that the defendant may recover on the note against the indorser and the sureties. *Hooker v. Blount*, 97 S. W. Rep. 1083 (Tex., Civ. App.). See NOTES, p. 484.

TAXATION — PARTICULAR FORMS OF TAXATION — TAX WITHIN MEANING OF BANKRUPTCY ACT. — A corporation went into bankruptcy owing the state for its annual license or franchise tax. *Held*, that the state is entitled to a preference over other creditors, as this is a tax within the meaning of § 64 a of the Bankruptcy Act. *State of New Jersey v. Anderson*, U. S. Sup. Ct., Dec. 10, 1906. See NOTES, p. 490.

TRUSTS — FOLLOWING TRUST PROPERTY — EQUITABLE LIENS ARISING FROM UNLAWFUL DEPOSIT. — A national bank unlawfully received on deposit a large sum of county taxes, mingled it with other deposits, and purchased worthless securities therewith. Into these securities could fairly be traced three-fourths of the county's deposit along with a much larger sum of the bank's own. The bank became insolvent, leaving assets insufficient to meet the county's claim. *Held*, that the county may get from the receiver the lowest amount continually on deposit during this period and also the entire proceeds of the securities. *Crawford Co. Commissioners v. Patterson*, 149 Fed. Rep. 229 (Circ. Ct., N. D. Oh., E. D.).

Though its reasoning is confused, the court's conclusion is sound. There was in fact an equitable lien on each fund. For a discussion of the true view, see 19 HARV. L. REV. 511.

WATERS AND WATERCOURSES — SUBTERRANEAN AND PERCOLATING WATERS — APPROPRIATION OF MINERALS IN SOLUTION. — The defendant, by pumping brine from his mine, abstracted salt from the plaintiff's mine. The plaintiff sought to enjoin him and to recover for the salt already withdrawn. *Held*, that the defendant has committed no actionable wrong. *The Salt Union, Ltd. v. Brunner, Mond & Co.*, [1906] 2 K. B. 822. See NOTES, p. 487.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

TAXATION OF GROSS RECEIPTS OF INTERSTATE CARRIERS. — For over fifty years the Illinois Central Railroad, an interstate carrier, has paid to the state of Illinois, in accordance with stipulations in its charter, five per cent of its gross receipts in addition to the usual property tax. A suit recently instituted by it against the state to recover back a portion of the taxes so paid has

prompted Professor Schofield, of the Northwestern University Faculty of Law, to consider in a recent article the constitutional validity of this form of taxation. *The State Tax on Illinois Central Gross Receipts and the Commerce Power of Congress*, 1 Ill. L. Rev. 440 (February, 1907).

To the question whether a state may constitutionally levy such a tax on gross receipts the United States Supreme Court has given seemingly contradictory answers. In 1873 it upheld the tax, in *State Tax on Railway Gross Receipts*.¹ In 1887, in Philadelphia, etc., *Steamship Co. v. Pennsylvania*,² it expressly disapproved the earlier case. And in 1891, in *Maine v. Grand Trunk R. R. Co.*,³ it apparently returned in part to its original view, holding valid a tax ascertained by multiplying the railroad's average gross receipts per mile over its entire system by the number of miles within the taxing state. The ground taken by the five judges who constituted the majority, that the tax might be supported as an excise, seems unsound, as an interference with the commerce power of Congress. It may, however, be sustained on the theory that, if in lieu of the ordinary property tax and not in excess of it, it was in its essence a franchise tax based on the value of the property within the state.⁴

Professor Schofield, after stating the question at issue, proceeds: "Viewing it merely as a state law, laying a tax upon gross receipts, and including in the gross receipts those derived from transporting goods and passengers in the way of interstate commerce, the provision [in the Illinois Railroad's charter] is probably bad." This proposition is certainly sound if confined to assessments on gross receipts resulting from interstate transactions as such. But apparently Professor Schofield thinks it constitutionally impossible to devise a state rule for apportioning gross receipts of an interstate road when the haul begins or ends in the state, so as to subject even a part to the taxing power, on the ground that the price paid for an interstate haul is of necessity indivisible. This differs widely, he says, from a tax upon the property of the railroad, in which case the mileage rule of apportionment may be applied for the purpose of fixing the taxable value of the interstate property.

There is undoubtedly some distinction between the two species of taxation. The question is, should this change the result? The Grand Trunk case, while recognizing the distinction, seems to say it is one without a difference in any case where the gross receipts tax is apportioned, and is substituted for a property tax. It is true, that as the Illinois gross receipts tax was not a substitution, but an addition, and was not even apportioned, it does not come within the rule of the Grand Trunk case. Nevertheless the discussion of the subject, in making no reference to the latest utterance on the subject by the United States Supreme Court, is incomplete. The article relies mainly on a dissenting opinion of Mr. Justice Miller in the *State Tax on Railway Gross Receipts* case. While this is an almost prophetic enunciation of the present-day tendency to extend the power of Congress under the commerce clause, it is of little real authority today. It seems clear that Professor Schofield could have effectively shown the invalidity of the Illinois tax by relying on the Philadelphia Steamship case, which is overruled only in the situation where the tax in question is a substitution for a property tax and is apportioned on some just basis so as to separate as accurately as possible the proportion of gross receipts actually earned within the state.⁵

RATIFICATION OF AN UNAUTHORIZED CONTRACT OF INSURANCE AFTER THE OCCURRENCE OF LOSS. — Of the many unsettled problems in the law of ratification Mr. Frederick T. Case has selected one of the more difficult, and in a recent article has given it what is probably its first thoughtful treatment.

¹ 15 Wall. (U. S.) 284.

² 122 U. S. 326.

³ 142 U. S. 217.

⁴ *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688; see, generally, 17 HARV. L. REV. 248, 261-263.

⁵ See *Cumberland, etc., R. R. Co. v. Maryland*, 92 Md. 668.

A Question of Ratification in Insurance Law, 19 Green Bag 93 (February, 1907). If an agent without authorization effects insurance on property for the benefit of the owner, can such owner, if he first hears of the transaction after the loss has occurred, ratify the act and recover on the policy? Mr. Case answers in the negative.

From the standpoint of insurance law the question offers little difficulty. It is true that the quasi-agent has not what is commonly termed "an insurable interest." But the fact that he acted in expectation that the insured, who has an insurable interest, would ratify, must be enough to prevent the contract from being void; for otherwise ratification at any time would be useless, since it could not make a void contract valid.¹ As such a transaction is in no way wagering, it would seem not to come under the ban of the law.

But we are confronted with more difficult questions in the law of agency. The maxim that ratification is equivalent to an antecedent command leaves still unsettled when ratification will be permitted. If this subsequent assent with its fictitious relation back were allowed in our supposititious case, the principal could clearly recover. It is often stated, however, that a man cannot ratify a contract at a time when he cannot make it.² This principle would seem to support Mr. Case's answer, since a man cannot insure property after it has been destroyed.³ Again, ratification with its fictitious relation is barred in general when it would work inequitable results.⁴ To the argument for Mr. Case that it is inequitable to permit the insured to decide whether or not he will adopt the contract after his opportunity to consider the intervening circumstances, there is the answer that the insurer can recover from the quasi-agent in an action on implied warranty whatever he suffers by the insured's disaffirmance, and that a contrary holding would kill the doctrine of ratification, since this is the situation in every instance. Against him it is urged that since the insurer has received the premium, and since the contingency upon which he conditioned his liability has occurred, it is not inequitable to make him pay as he stipulated. But there is a fallacy in this. If the insured disaffirmed, inasmuch as the quasi-agent would have no ground upon which to recover the premium he paid,⁵ the insurer could keep the money without risk of loss, and so refusing to allow the insured to ratify would not give the insurer an enrichment he otherwise would not have. It is suggested that the best theory on which to base the doctrine of ratification is that the assent of the third party at the time of the original transaction is considered as continuing until withdrawn, and this is met by the assent of the other contracting party when the principal later ratifies.⁶ According to this, our problem must be answered in the negative, since the insurer's assent cannot be considered as continuing after the occurrence of the loss, for the contract can then no longer be made.

The text-writers lay down the law contrary to Mr. Case's view, and the language of the cases they commonly cite in accord supports them. But, as the writer points out, in all these cases the quasi-agent is part-owner or bailee of the property insured, or has some interest in it. He insists that this actually and logically distinguishes these cases from the problem he puts. The validity of this distinction is uncertain, but thanks are due to him for his exposition of the exact state of the authorities. Mr. Case cites, as in effect supporting his solution of the problem, several cases involving analogous situations, and his deductions from these seem logical.

ABUSE OF THE CORPORATION CHARTER, THE. *Don E. Mourry*. Analyzing the incorporation law of several states, and urging the necessity of a federal law to govern incorporation. 64 Cent. L. J. 49.

¹ *Milford Borough v. Water Co.*, 124 Pa. St. 610.

² *Cook v. Tullis*, 18 Wall. (U. S.) 332.

³ *Williams v. North China Ins. Co.*, 1 C. P. D. 757, 766, *per* Jessel, M. R.

⁴ *Pollock v. Cohen*, 32 Oh. St. 514; see 9 HARV. L. REV. 60, 62.

⁵ See *Hagedorn v. Oliverson*, 2 M. & S. 485; *Story, Agency*, § 248.

⁶ See *A Problem as to Ratification*, by Prof. Eugene Wambaugh, 9 HARV. L. REV. 60.

- ADMISSIBILITY, IN A CRIMINAL TRIAL, OF THE FORMER TESTIMONY OF A WITNESS, SINCE DEAD. *Walter R. Staples*. Contending that the rule should be uniform for civil and criminal actions, and that such evidence is admissible. 12 Va. L. Reg. 755. See 13 HARV. L. REV. 687.
- ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. *George A. Macdonald*. Discussing the present unsatisfactory status of deeds of assignment in England. 122 L. T. 238.
- "COMMON LAW LIEN." *Anon.* Pointing out the inaccurate use of the word "lien" by English courts in so naming the right of auctioneers to retain the price until paid their fees. 26 L. N. (London) 18.
- CONSTITUTIONAL ASPECTS OF EMPLOYERS' LIABILITY LEGISLATION. *Ernst Freund*. Criticizing the proposed Employers' Liability Act in Massachusetts as being too radical a step in the right direction. 19 Green Bag 80.
- DEFENSE OF "FAIR COMMENT" IN ACTIONS FOR DEFAMATION, THE. *Francis R. Y. Radcliffe*. 23 L. Quar. Rev. 97. See 20 HARV. L. REV. 152.
- EVIDENCE TO SHOW INTENT. *Ernest E. Williams*. 23 L. Quar. Rev. 28.
- HOW TO STOP PERJURY IN OUR COURTS. *W. J. Gaynor*. Discussing the summary power conferred by statute in New York on trial judges to punish witnesses who seem to be guilty of perjury. 8 Bench and Bar 15.
- INCIDENCE OF ESTATE DUTY IN REGARD TO PERSONALTY, THE. *W. Strachan*. Criticizing the English system of paying estate duty on personalty out of the residuary estate alone. 23 L. Quar. Rev. 88.
- INTERSTATE COMMERCE CLAUSE AND STATE CONTROL OF FOREIGN CORPORATIONS. *Frank E. Robson*. Pointing out the present diversity in the state laws controlling foreign corporations. 5 Mich. L. Rev. 250.
- JAPANESE CODE AND THE FAMILY, THE. *Munroe Smith*. 23 L. Quar. Rev. 42.
- JUDICIAL DISPENSATION FROM CONGRESSIONAL STATUTES. *William Trickett*. Maintaining that the authority to pass on the constitutionality of statutes was not intended to be given to courts by the Constitution. 41 Am. L. Rev. 65.
- LIABILITY FOR ACTS OF PUBLIC SERVANTS. *W. Harrison Moore*. Considering how far the shield of the crown should be extended to protect public officers in England from liability. 23 L. Quar. Rev. 12. Cf. 20 HARV. L. REV. 245.
- MONROE DOCTRINE: ITS STATUS. *John F. Simmons*. 5 Mich. L. Rev. 236.
- "MORTGAGE CHARGE" OF THE LAND TRANSFER ACTS, THE. *James Edward Hogg*. Giving a detailed study of the right embraced in the "charge," as distinguished from the common law mortgage. 23 L. Quar. Rev. 68.
- PAR VALUE OF STOCK, THE. *Frederick Dwight*. Condemning the present system of fixing the par value of stock irrespective of the real value of the corporation's assets. 16 Yale L. J. 247.
- POSSIBLE FEDERAL TRUST LEGISLATION. *Walter C. Noyes*. Pointing out that Congress can constitutionally regulate our producing trusts by treating them as instrumentalities of interstate commerce. 7 Colum. L. Rev. 93.
- PRIVILEGED COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT. *W. C. Rodgers*. Collecting authorities. 64 Cent. L. J. 66.
- PROPOSED SPECIAL JURY ACT, THE. *Howard O. Sprogle*. Briefly stating the purpose and operation of the proposed plan for a preliminary examination of veniremen by jury commissioners. 1 Ill. L. Rev. 446.
- QUESTION OF RATIFICATION IN INSURANCE LAW, A. *Frederick T. Case*. 19 Green Bag 93. See *supra*.
- REASONABLE CARE IN THE PAYMENT OF SAVINGS DEPOSITS AND CONSTRUCTION OF PROTECTIVE BY-LAWS. *Anon.* 24 Banking L. J. 49.
- SCHOOLING RIGHTS UNDER OUR TREATY WITH JAPAN. *Simeon E. Baldwin*. 7 Colum. L. Rev. 85. See 20 HARV. L. REV. 337.
- STATE TAX ON ILLINOIS CENTRAL GROSS RECEIPTS AND THE COMMERCE POWER OF CONGRESS. *Henry Schofield*. 1 Ill. L. Rev. 440. See *supra*.
- STUDY OF ROMAN AND CIVIL LAW, THE. *William Wirt Howe*. 41 Am. L. Rev. 47.

II. BOOK REVIEWS.

FOUNDATIONS OF LEGAL LIABILITY. By Thomas Atkins Street. In three volumes. Northport, N. Y.: Edward Thompson Co. 1906. pp. xxix, 500; xviii, 559; xi, 572. 8vo.

The present work, in its main features, constitutes a general text-book on the subjects of tort and contract. As indicated by the title, however, the author

treats his subjects in a more historical and more scientific manner than is usually found in treatises on those subjects. Mr. Street goes back to the infancy of the common law and discusses the foundations of legal liability in the light of modern thought. While the work necessarily deals with fundamental questions, it is not rudimentary. The most advanced student of the genesis of our law will find food for thought in these three volumes. The main defects of the work are those which always result from an attempt to deal with a broad subject in limited space. The author is too often compelled to give general conclusions without advising the reader of the method by which they were reached.

The first volume embraces the subject of tort. The author traces the affinity of various wrongs from the early violent trespass down to the latest development of injuries. In taking "violent trespass" as a starting-point, Mr. Street has adopted a sequence much more in keeping with historical revelation than that followed by many other writers. The author is to be highly commended in treating negligence, not as a specific wrong, but, like fraud or malice, as a mere factor playing an important part in large groups of wrongs. This has compelled the adoption of new nomenclature in the division of the so-called "torts of negligence." The author meets this difficulty very satisfactorily by dividing them into "primary and secondary trespass formations." While this may be thought to be a mere matter of terms, it represents an advance in legal knowledge, in that it makes possible the assignment of the conception of negligence to its proper place in legal theory. The principles of "intervening cause" and "successive negligent acts" are not well handled and are even more inadequate than any limitation in space should have made necessary. The brevity of the general treatment is apparent when it is observed that only about two pages are devoted respectively to such subjects as "*res ipsa loquitur*" and "proximate cause." "Assumption of risk" and the "fellow servant doctrine" together cover only ten pages. In the preface Mr. Street claims to have "somewhat happily hit upon the term 'disseisin of chattels'" as expressive of the fundamental idea in conversion. This claim of the author is somewhat surprising in view of the fact that "Disseisin of Chattels" was the subject of three articles by Dean Ames in 3 HARVARD LAW REVIEW (1889), in which the propriety and advantage of the use of this expression were conclusively demonstrated. The value of the first volume is increased by the citation in the text of many concrete cases, which unfortunately are found wanting in the other volumes. These cases are well selected, and are readily distinguishable from the text by being printed in smaller type.

In the second volume the author discusses the subject of contract. While we do not agree with many of the views expressed, — for example, in regard to the nature of the bilateral contract, — still it must be said that the book presents an up-to-date exposition of fundamental principles. In an appendix is found the text of the Negotiable Instruments Law, with some comments by the author, and an incomplete collection of the cases decided under the law. This appendix, occupying some fifty pages, is somewhat out of keeping with the spirit of the balance of the work, and is inferior in practical value to the various special books on the subject.

The third volume embraces an essay on the natural history of remedial law and brief discussions of the various common law actions. The author has not attempted to give the whole law, or even an imposing part of the law, pertaining to those subjects, but does present a consistent account of the origin, evolution and ultimate scope of the various remedies.

The work carries within it conclusive evidence of thorough investigation on the part of the author. Much of it shows original thought. The author has had the courage to overstep the traditional jealousy of the law as to many forms of expression. The vocabulary takes a freer range than is usually found in legal books, adding to the interest and often to the accuracy of the work. To the busy lawyer, immersed in exhaustive treatises on special subjects, who finds himself losing his grasp upon the true relationship existing between those subjects, this work will give entertainment and stimulus in the study of the law. In the citations there will be found to be a dearth of modern decisions, espe-

cially from the courts of this country. This is unfortunate, for the work could have been made more practical in this respect, without in any way changing its spirit or scope. The indexing is fair, and the work of the publishers is excellent.

J. M. B., JR.

STUDIES IN-AMERICAN JURISPRUDENCE. By T. F. C. Demarest. New York: The Banks Law Publishing Company. 1906. pp. iv, 414. 8vo.

The essays in this volume are mainly reprints of occasional articles contributed to legal periodicals. They represent two distinct classes. Those of one kind, which relate to historical or philosophical questions, are written in a form so broken by parenthetical clauses and so full of self-conscious phrasing that only the most careful reading will disclose the meaning. Once reached, the ideas are interesting because they show that at least one point of view has been consistently and independently examined. The other and more readable class of the articles, though these also demand close attention, is composed of monographs comparing important legal decisions in their bearing on certain narrow points of law. Three of the essays, occupying nearly two-thirds of the text, relate to the legal problems arising from the use of city streets by railroads. These are perhaps the clearest in the book, showing a commendable freshness of treatment and ability to discard immaterial details. The work suffers, however, from the author's failure to make clear to the reader, as he progresses, the outline or plan of argument.

From its broad and general title one might expect in the volume a comparison of co-ordinate parts of our law or a discussion of salient institutions or fundamental principles. That expectation will be disappointed. The book deserves its title just as much — and as little — as would a collection of opinions on various points in American law. The principal reason for using so general a title seems to be that nothing less inclusive would apply to the extremely diverse subjects which have been brought together. By reason of this scattering character of the topics the present collection seems no more likely to suit the convenience of any one group of readers — except perhaps those interested in the rights of abutting owners in street railway cases — than the periodicals in which they may already be found.

R. N. M.

THE ACT TO REGULATE COMMERCE (as Amended), and Acts Supplementary thereto Indexed, Digested and Annotated, including the Carriers' Liability Act, Safety Appliance Acts, Act Requiring Reports of Accidents, Arbitration Act, Sherman Anti-Trust Act, and others. By C. S. Hamlin. Boston: Little, Brown and Company. 1907. pp. 480. 8vo.

Of the making of books on the interstate commerce laws there is no end. Mr. Hamlin's book provides a mechanical convenience for time-pressed lawyers, — at least, we are inclined to think that will be its only utility. The first part of the book prints the full text of the various statutes that form the body of the interstate commerce legislation, using, so far as available, the text of the Interstate Commerce Commission compilation of June 30, 1906, and indicating by brackets and marginal annotations the various textual changes. The second half, which forms the bulk of the book, contains an index-digest of the following acts of "special interest and importance to shippers and carriers": the Interstate Commerce Act of 1887 and its amendments, including the Rate Bill of 1906; the act relating to testimony before the Interstate Commerce Commission; the immunity statute of 1906 called forth by Judge Humphrey's decision in the Armour case; the Elkins Act; the act to expedite hearings, and the Joint Resolution of June 30, 1906, postponing the operation of the Rate Bill. This index-digest consists of an alphabetical list of the "leading" words and phrases found in the foregoing acts, with a "concise digest of the text relating to the respective words and phrases," and a reference, by page and line, where the words may be found. The same method is pursued with the various other acts.

By a cross-reference to all the digests a word may thus be traced, and its use compared in all these laws which are, more or less, *in pari materia*. Use alone can establish the accuracy and exhaustiveness of this compendium, but the surface indications sufficiently invite confidence. So far as it goes, the book is worth while as a handy collection of much-thumbed laws. Had it been supplemented, however, by the judicial construction thus far placed on the leading words and phrases, the book would have been much more serviceable.

F. F.

ELEMENTS OF LAW, considered with reference to Principles of General Jurisprudence. By William Markby. Sixth Edition. Oxford: At the Clarendon Press. 1905. pp. xii, 436. 8vo.

In the preface to the fifth edition of his classic treatise on the Elements of Law, Sir William Markby wrote: "English lawyers have always preferred authority to principles; and they seem to regard principles with something like suspicion. Still I would advise students to make some attempt to discover principles: and this book is an imperfect endeavor to assist them in doing so." It is needless to say at this date that the learned author has given great assistance to students. The fact that six editions of this work have been called for is proof in itself of its worth. It would be of great advantage in the development of English law if more works of this character would be written to influence English and American lawyers to appreciate the value of principles in the making of sound authority.

This work has been in practically the same form since the third edition. The section numbers are the same, and the book has not expanded in size. As the author himself states, this edition is largely identical with the last. Some slight changes have been made in the sections dealing with the subject of "sovereignty." Section 16 of the fifth edition is omitted, and section 16*a* of that edition becomes section 16 of this; section 17*b* of the fifth edition becomes section 17*e* of this edition, and sections 17*b*, 17*c*, 17*d* are new matter. In these new sections, Sir William Markby points out that in international law the word "sovereignty" is not used in the precise sense attributed to it by Austin, nor has Austin's conception of sovereignty anything to do with politics. "It sometimes suits politicians," he says, "to use language of a very vague kind, as when they speak of 'sovereignty of the people.' Such a phrase has no legal significance."

The changes in this edition are so slight that those who possess copies of the next earlier edition will not need to add this to their library; but the work itself is, of course, of such great intrinsic merit that it is well worth possession by those who do not already own it.

S. H. E. F.

HISTORY OF ROMAN PRIVATE LAW. By E. C. Clark. Part I. Sources. Cambridge: At the University Press. New York: G. P. Putnam's Sons. 1906. pp. 168. 12mo.

POLITICS AND DISEASE. By A. Goff and J. H. Levy. London: P. S. King & Son. 1906. pp. 291. 8vo.

ART OF ADVOCATES AND PUBLIC SPEAKING. By J. W. Donovan. Rochester, N. Y.: Williamson Law Book Company. 1905. pp. 145. 12mo.

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BUSINESS POLICIES INCONSISTENT WITH PUBLIC EMPLOYMENT.

Dedicated to Professor Langdell.

I.

ALTHOUGH from the earliest times some restraint has been exercised over such lines of activity as are of vital interest to the public, in recent times there undoubtedly is an increasing need of stricter regulation of those important employments which are affected with a public interest. It is true that there are many men who still avow the principle of *laissez faire*, who say that it is the better policy to leave all business with as little interference from the law as possible; but most men now realize that a sharp distinction must be drawn between the ordinary private businesses and the exceptional public callings. Indeed, in the case of the modern public service companies, their power over all commercial activities has become so apparent that the necessity for the control of that power for the protection of the whole people is generally conceded; and it is hardly too much to say that the efficient regulation of the public employments by sufficient law is the most pressing problem confronting this nation. In this crisis of affairs it behooves lawyers to show the people that the law is indeed adequate to deal with the situation, that it has not only elaborated detail to meet obvious wrongs seldom defended, but also enlightened comprehension to deal with the large policies openly justified which are truly inconsistent with public duty. Undoubtedly it is now thoroughly understood by all who conduct public

services that they must not unjustifiably refuse applications for service, wilfully neglect to provide adequate facilities, unreasonably demand unusual prices or capriciously discriminate between their patrons. Nevertheless it is occasionally asserted by the managers of a public employment that they may refuse to give service when it becomes necessary to protect their business interests; and more frequently the right is claimed to make differences in their prices in order to promote their business interests. This position that the same business policies are justifiable in public employments as in private enterprises is taken with such confidence at times, that it is most necessary that those who are conducting the public services should be told in so uncompromising a manner that they may at length realize its full significance, that, while those who conduct private enterprises may devise many schemes so long as they keep within the limits of fair competition, those who profess a public employment must not adopt any business policies which are in any way truly inconsistent with their public duties.

II.

From a business standpoint it may be an effective policy at times to refuse to have any dealings with a customer who persists in patronizing a rival, and certainly it is often advantageous to make a lower price to customers who will give exclusive patronage. This is fierce competition in both cases, but it must be admitted that it is all fair enough in individual competition, although very probably concerted action of either sort would constitute an actionable conspiracy, because when monopoly is present these policies become too oppressive to be borne. The employment of such policies might well be forbidden those who conduct public services upon this ground alone, since in such businesses virtual monopoly is usually present. Moreover, in the case of public services such a policy would seem to be in the face of the public duty to serve all that apply and treat all without discrimination. But although it will be seen that the law is positive that in public service outright refusal to deal with an applicant who is patronizing a rival is illegal, the law does not seem to be so clear that special reductions may not be made to those who will give exclusive patronage.

If one accepts the premise that in a public service one may do nothing to foster his own interests that is inconsistent with his

public duty, it is impossible to justify the outright refusal to serve an applicant, who wishes service, on the ground that he is dealing with a rival. An example of this is *Chicago & Alton R. R. Co. v. Suffern*,¹ where the court held that a railroad could not refuse to receive coal from a shipper who had begun to make shipments by another route, basing its decision upon the ground that serious injury would result to the business interests of the people if shippers could be compelled by such arbitrary measures to patronize one railroad to the exclusion of others. Upon somewhat similar principles, in a later case, *Portland Natural Gas & Oil Co. v. State*,² it was held an insufficient answer to a *mandamus* to compel a company to supply an applicant with gas, that the relator was being supplied by another gas company; for the court said that it would not permit the establishment of perpetual rights to give exclusive service by any such arrangements.³

The advantages which may accrue to a public service company if it may make lower rates to those who will deal with it exclusively are plain, and this policy would doubtless largely prevail in making rates for competitive business, if it were not for the general recognition of its essential illegality. It has already been seen that those who conduct a public employment must forego many methods of getting business and holding it which are permissible in private affairs. And it would seem to be plainly contrary to public duty for a public servant to charge certain applicants more than others because they have dealings with a rival. Most courts so hold, for reasons best expressed in the leading case of *Menacho v. Ward*.⁴ In that case a regular line to Cuba put upon a black-list those who shipped by tramp steamers and charged them higher rates than others. Such discrimination, the court said, is not only unreasonable but is odious, because of its tendency to destroy competition and establish monopoly. On the other hand, in an important case in New York, *Lough v. Outerbridge*,⁵ where a steamship company made a lower rate to those merchants who would not ship by a

¹ 129 Ill. 274.

² 135 Ind. 54.

³ Two other cases upon this general subject should be stated. In the leading case of *Bennett v. Dutton*, 10 N. H. 481, it was held that a passenger who had come from Lowell to Nashua by a rival line must be taken from Nashua to Amherst. And in the recent case of *Gynne v. Citizens' Telephone Co.*, 61 S. C. 83, it was held that an applicant for a telephone could not be refused on the ground that he was a subscriber to a rival telephone system. The discussion in both of these cases is well worth careful reading.

⁴ 27 Fed. Rep. 529.

⁵ 143 N. Y. 271.

rival line, the court held that there was no illegal discrimination, since the concession was offered to all who would conform with the condition.

Notwithstanding the weight to be given to this decision, it is submitted that it is opposed to what are conceived to be fundamental principles. As between two shippers who offer the same goods for the same transportation, it seems to constitute personal discrimination, with all its accompanying evils, to make one rate to one and another rate to another by reason of the fact that one ships exclusively and the other does not. And it ought to be plain that this is so, whether it is done as in *Menacho v. Ward*,¹ by charging the one who does not ship exclusively more than the usual rate, or, as in the case of *Lough v. Outerbridge*,² by giving exclusive shippers concessions from regular rates.³

III.

Another policy which is often of such obvious advantage as to be common in ordinary business is to make lower proportionate rates to larger than to smaller customers, and even occasionally to decline to deal with very small customers who may be more trouble than they are worth. The latter is a small matter, perhaps, while the former is a matter of great moment to the managers of public services, who may often see the opportunity to get large amounts of valuable business, highly profitable in the aggregate even at lower proportionate rates, if they can still maintain higher proportionate rates upon the regular business which they get from smaller customers who are not in a position to dictate their terms.

It should be obvious that in a public employment all applicants must be served at fair rates, even if in a particular case it is espe-

¹ *Supra*.

² *Supra*.

³ The jurisdictions are divided still upon the fundamental question whether there is a general principle against every form of discrimination at common law, although today the rule against all discrimination is established by the great weight of authority. In none of these majority jurisdictions has the fact that the favored applicant is an exclusive customer been held to constitute a justifiable difference, although this justification has been urged several times unsuccessfully. *Mobile v. Bienville Water Co.*, 130 Ala. 379; *L. E. & St. L. C. R. v. Wilson*, 132 Ind. 517; *Messenger v. Pennsylvania R. R.*, 37 N. J. L. 531; *Railroad Discrimination Case*, 136 N. C. 479; *Scofield v. Ry. Co.*, 43 Oh. St. 571; *Baxendale v. Great Western R. R.*, 5 C. B. (N. S.) 309. It proves little, of course, that in several of the jurisdictions which have held that there is no rule against discrimination as such, it has been held not improper to grant special reductions to exclusive customers. *Ex parte Benson & Co.*, 18 S. C. 38; *Houston & T. C. R. R. v. Rust & Durkins*, 58 Tex. 98.

cially bothersome or even particularly expensive. Those who profess a public employment must fulfill their public duty to all who apply, and must realize that this will be more troublesome in some cases than in others; and indeed, so long as the business as a whole is profitable, they should not complain if some occasional services may result in loss. This was pointed out very clearly in *State v. Citizens' Telephone Co.*,¹ where the defendant telephone company relied upon the fact that in order to serve the plaintiff applicant it would be obliged to install a new switch-board at great additional expense; but the court felt that this furnished no sufficient ground to justify a refusal to serve this member of the public upon the same terms as any other person.² Whatever serious loss may result from being obliged to serve in small units, may be avoided by the practice of establishing fixed units of reasonable size in which alone services will be rendered. This system of minimum rates has been supported by several cases, among them the case of *Gould v. Edison Electric Co.*,³ in which it was held that an electric company might fairly charge a consumer \$1.50 a month even if less electricity by measure was used in that month.⁴

It is common knowledge that in the conducting of many large public services discounts have been made to large customers in order to get their trade and to retain it, and although this practice is not often made public at the present time, still it is the policy sometimes adopted and, when attacked, openly defended. That this policy may be often advantageous in public, as it is in private business, may be admitted. But it has already been seen that public duties may conflict with business policies; and that such a policy does conflict with public business may be argued from its deplorable results. The undue favoring of large customers will

¹ 61 S. C. 83.

² *Harp v. C. O. & Gulf Ry.*, 125 Fed. Rep. 445, which held that a railroad may take the attitude that it will deal only with large customers who have special equipment for shipment, must be wrong; the contrary is held in *Thompson v. Pennsylvania Ry.*, 10 I. C. C. Rep. 640.

³ 60 N. Y. Supp. 559.

⁴ Upon similar principles a water company may refuse to supply water for less than a period of three months (*Harbison v. Knoxville Water Co.*, 53 S. W. Rep. 993 (Tenn.)); while it would be unreasonable to make the unit so long as a year (*Rockland Water Co. v. Adams*, 84 Me. 472). Perhaps more familiar examples are the flat five cent fare upon street railways, even if the passenger rides but one block (*Milwaukee Electric Ry. Co. v. Milwaukee*, 87 Fed. Rep. 577), and the one hundred pound minimum rate upon package freight (*Wrigley v. C. C. C. & St. L. Ry.*, 10 I. C. C. Rep. 412).

give them such commercial advantages that they will crush out their smaller competitors; and this is particularly true when a railroad company adopts the policy of making lower proportionate rates to large customers as such. This was the line of argument relied upon by the court in the leading case of *Hays v. Pennsylvania R. R. Co.*,¹ where the rather plausible scheme was adopted of a sliding scale by which the amount of rebate was graduated by the quantity of freight furnished by each shipper, a scheme which the railroad urged was adopted in good faith for the purpose of stimulating production and increasing its tonnage. But the court said that if the rate was fixed by the business furnished the railway, the smaller operator must sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. Although this case now represents the great weight of authority, it must be admitted that there is still a respectable minority which holds that lower relative rates may be made to large customers despite the injury which small customers must suffer thereby. In the case of *Silkman v. Water Commissioners*,² for example, it was held that lower water rates might be given to large consumers than to small consumers, the court saying that to make such differences was a business principle of general application. The courts which take this view profess to limit their doctrine by the qualification that the differences between the rates for large and small customers must not be unreasonable, but it is difficult to see any standard by which that difference may be tested if it is once permitted; and indeed it may be asserted with confidence that it is opposed to fundamental principles whenever the services to large customers and to small customers are practically identical, as they usually are.³

Although it may fairly be said that the services are practically identical when it is simply a question between two customers, one of which pays larger aggregate bills than the other by reason of the fact that his total requirements may have been greater, it is necessary to point out that there are differences in the cost of

¹ 12 Fed. Rep. 309.

² 152 N. Y. 327.

³ By the undoubted weight of authority it is illegal to make reductions to large customers as such. *Western U. T. Co. v. Call Pub. Co.*, 161 U. S. 92, affirming s. c., 44 Neb. 326; *Hays v. Pa. Fuel Co.*, 31 Fed. Rep. 652; *Kingsley v. B. N. Y. & P. Ry.*, 37 Fed. Rep. 181; *United States v. Tozer*, 39 Fed. Rep. 369; *L. E. & St. L. R. R. v. Wilson*, 132 Ind. 517; *Cook v. C. R. I. & Pac. Ry.*, 81 Ia. 551; *Scotfield v. Ry. Co.*, 43 Oh. St. 571; *Fitzgerald v. Grand Trunk Ry.*, 63 Vt. 169. But see the elaborate opinions to the contrary in *C. & P. R. R. v. Forsaith*, 59 N. H. 122, and *Silkman v. Yonkers Water Commissioners*, 152 N. Y. 327.

service by reason of the ways in which business is handled; and in so far as these economies in handling business in large units are real, a proportionate reduction may be made to the customer who has services in more convenient units. For example, the economies of transportation in carload lots are very great, and recognizing this fully in an early ruling, *Scofield v. Lake Shore & Michigan Southern R. R. Co.*,¹ the Interstate Commerce Commission held not unreasonable a rate per hundred pounds upon refined oil in less than carload lots one hundred per cent greater than the rate upon carload lots, remarking that there was fully that difference in the cost of handling the freight. And in a recent United States Supreme Court decision, *Western Union Telegraph Company v. Call Publishing Co.*,² it was recognized that lower proportionate rates might be made upon long press messages than upon ordinary short commercial messages, the court saying that the principle of equality forbids any difference in charge which is not based upon difference in service, and that even then it must have some reasonable relation to the amount of difference.³ Neither of these holdings, it will be noticed, would justify the granting of lower proportionate rates to large customers, as such. Under the first ruling a lower proportionate rate should not be made to the shipper of many carloads as compared with the shipper of one carload; nor under the second decision should a lower proportionate rate be given a newspaper which sent many separate messages than one which sent few. It may also be pointed out that the customer whose annual bills are the largest, or whose business is largest in the aggregate, may be the one who asks services in the most inconvenient units and in the most expensive ways. All this being so, granting a special concession to large customers as such is in the face of the public service law, which requires that all should be served without discrimination, — an unanswerable objection, however advantageous this policy may be in obtaining business.

¹ 2 I. C. C. Rep. 90.

² 181 U. S. 92.

³ It is generally recognized that the more convenient service may be charged for at a proportionately less rate. Thus a shipper who furnishes his own terminal facilities may be given a lower rate to that extent. *Root v. Long Island R. R.*, 114 N. Y. 330. And, again, a shipper who furnishes his own cars may properly be allowed their rental value. *State v. C. N. O. & T. P. Ry.*, 47 Oh. St. 130. So well agreed is it that the difference in cost of service must be demonstrated clearly, that in the United States, at all events, the granting of a lower rate per car for a train load is forbidden. *Paine Bros. v. Lehigh Valley R. R.*, 7 I. C. C. Rep. 218. But see an English case, *Nicholson v. Great Western Ry.*, 5 C. B. (N. S.) 366, holding it justifiable to make a concession to the shipper of regular train loads.

IV.

In pursuance of the same policy of increasing the total profits by reaching out for additional business which may be obtained by making concessions from the ordinary rates charged regular customers, many managers of public services claim the right to make special concessions for special kinds of business, in which the ordinary prices could not be afforded. The same argument is made here which is made elsewhere, that handling this additional business will normally tend to the benefit of regular customers, since the additional business, if rightly managed in their interest, will relieve the regular business of a share of the fixed charges.¹

It is perhaps necessary to point out here that a public service may to a certain extent limit its profession and accordingly refuse to enter upon lines of business which it does not wish to undertake, and that in such a case it cannot be compelled to perform upon any terms for any one. And it might therefore make special bargains in individual cases in reference to the performance of such outside business, without committing itself to serve all that apply; but it does not follow that, if it has once professed a line of business, it can limit its profession of that business to certain persons engaged in it. There is an English case, *In re Oxlade*,² which seems to say that if a certain railroad undertook to carry coal only for colliery owners, it could not be obliged to take it for any other class of persons; but this can hardly be, for it seems altogether inconsistent with the simplest rules of public duty. And in an American case, *Haugen v. The Albina Water Co.*,³ where a water company with mains laid in a street attempted to limit its duty to persons living upon certain portions of that street, it was held that the company owed service to all applicants located within its territory without discrimination.

¹ These views formerly had such currency that several courts were willing enough that common carriers should make a lower rate for freight shipped from B to C, which originally came from A, than for freight, of local origin, which was shipped from B to C. See *Johnson v. P. & P. R. R.*, 16 Fla. 623; *Ragan & B. v. Arken*, 9 Lea (Tenn.) 609. But by the present view such concessions are held plainly unjustifiable, since they involve personal discrimination. *Wight v. United States*, 167 U. S. 512; *B. & W. R. Co. v. Mobile, etc., Ry. Co.*, 60 Fed. Rep. 545; *Fitzgerald v. Grand Trunk Ry.*, 63 Vt. 169; *Brandt Milling Co. Case*, 4 Can. Ry. Cas. 259. Upon similar principles it is not allowable to make lower rates for transportation from A to B for goods eventually destined for C. *Alabama, etc., Ry. v. Railroad Commission*, 86 Miss. 667; *Hope Cotton Oil Co. v. T. & P. Ry.*, 10 I. C. C. Rep. 696.

² 15 C. B. (N. S.) 680.

³ 21 Ore. 411.

If public companies may not refuse to deal with persons who want services for one purpose while they profess to serve others who want the same services for another purpose, it would seem to follow that, in their dealings with their patrons who ask the same service, a public company ought to charge all alike, without regard to the need they have of the service. It is true that the results are not so deplorable when the discrimination is between patrons who put the service to different usage as they are when the discrimination is between applicants who are competitors; but it is submitted that from a logical point of view there is substantially the same illegality, and from a practical point of view there is much the same injustice. Nevertheless it is strongly urged by the railroad companies, for example, that they should be allowed to make different rates for commodities which are destined for different purposes. It is, again, pointed out that this policy may be necessary in order to get more traffic, and that this by the law of increasing returns may be for the benefit of all concerned. Moreover, the railroad managers sometimes make here an argument, which they elaborate in other situations, that upon grounds of public policy they should be permitted to make such lower rates as they did in *Hoover v. Pennsylvania R. R.*,¹ where they exacted one rate for coal to be sold at retail for domestic consumption and a lower rate for coal to be used for manufacturing purposes. And, indeed, in that case the court was persuaded that there was a public policy to support such concessions for special purposes in view of the encouragement given to productive industries by such preferential rates. But despite the economic argument, the legal principle remains that to charge different customers who wish the same service different prices, when there is no difference in the conditions under which the service is rendered, is plain inequality, and therefore outright discrimination. Singularly enough, this was the basis of the decision in another Pennsylvania case, *Bailey v. Fayette Gas-Fuel Co.*,² which was decided only a few years later. In that case a higher price per cubic foot was charged to customers who used gas simply for illuminating than was charged to such customers as used gas also for fuel. This was properly held to constitute unjustifiable discrimination, and so sweeping was the language of the court as to cover the less obvious case of making different prices for illuminating gas and fuel gas.³

¹ 156 Pa. St. 220.

² 193 Pa. St. 175.

³ Special concessions for special business are by the weight of authority illegal dis-

V.

It should now be apparent that the fundamental question under discussion is how far public duty must necessarily deprive those who conduct public employments from basing their business policies upon the elementary principle of the law of increasing returns. That net returns tend to increase with the volume of business in a normal case of an industrial enterprise is obvious; and the question is whether a public service company is to be permitted without hindrance to shape all things so as to hold its present business and to add to it. Some managers of public service companies assert this boldly, and a few say frankly, for example, that they base their rates upon what the traffic will bear, making high charges against business from which high rates can be got, conceding low rates in order to get business which could not otherwise be obtained. Of course this consideration has some place in every philosophy of rate making, but it is submitted that it is a dangerous principle which may often operate to the disadvantage of the public.

The real truth of the matter seems to be that, while in private business nothing need be considered except the law of decreasing cost, in public business there is the law against discrimination to be reckoned with. As the court said in the case of *Tift v. Southern Ry. Co.*,¹ it is no excuse for raising the rate upon a particular article, as lumber, that it will bear the advance; the question is rather what price it is fair lumber should pay in comparison with other commodities. It must be admitted, however, that the view of many economists, that it will be to the advantage of all concerned if railroad managers are permitted to adopt any schedule of rates which will produce the most tonnage, because that policy will by the law of decreasing costs tend with an enlightened management

criminations. *U. P. Ry. v. Goodridge*, 149 U. S. 680; *Com. v. L. & N. R. R.*, 68 S. W. Rep. 1103 (Ky.); *Hilton Lumber Co. v. Atlantic Coast Line*, 53 S. E. Rep. 823 (N. C.); *Fitzgerald v. Grand Trunk Ry.*, 63 Vt. 169; *Capital City Gas Co. v. Central Vt. Ry.*, 11 I. C. C. Rep. 103; *Manufacturer's Coal Rates Case*, 3 Can. Ry. Cas. 438. There are some opinions to the contrary. See *L. & N. R. R. v. Fulgham*, 91 Ala. 555 (statutory permission); *Bald Eagle W. Ry. v. Nittany V. Ry.*, 171 Pa. St. 284; *Metropolitan E. S. Co. v. Ginder*, [1901] 2 Ch. 799 (statutory construction); *Barnard C. V. D. C. v. Wilson*, [1901] 2 Ch. 813 (same). And in a few cases the point was left undecided, although it was involved. *M. K. & T. R. R. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553; *Smith v. Findley*, 34 Kan. 316.

¹ 138 Fed. Rep. 753.

to the lowering of all rates, is occasionally adopted by lawyers, and, indeed, has never been stated more strongly than recently, in the case of *Interstate Commerce Commission v. The Chicago Great Western Ry. Co.*¹ But if railway managers are left practically unrestrained by law, it is sufficiently plain that they will maintain a high schedule of rates between localities where they have control of the situation and for valuable goods which will bear high rates, while at the same time making disproportionate concessions from this standard to get business at competitive points or to induce the movement of low grade commodities.

The authorities upon these questions are a seething mass. The various commissions which are near to actual conditions seem to show a tendency to condemn the fixing of the differing rates between localities and the differential rates between commodities solely by economic principles of demand and supply, the unequal and unjust results of which the courts are apparently too far removed from the vital facts to realize or appreciate. But even in the courts a reaction seems to be at hand: in the *Naval Stores case*² the court seemed to be much shocked, at least, by the disproportion between the locality rates there disclosed; and in the *Window Shade case*³ the court considered the proportion to be observed between the rate established on raw material and the rate on the finished product. It is not enough to say that this power to make preferential rates may be used for the benefit of a railway's territory as a whole or the industries of the whole country, the fact remains that it is a power which may be abused. So long as this power is left in the hands of the railway management without power of review by any authority upon any fundamental principle, it is in the hands of the railroad officials to build up an artificial market where the natural conditions are adverse, or to turn an industrious city into a wilderness again; and, without restrictions by law, it is within their power to protect certain lines of industry and to crush out others. It is believed that these are too great powers to entrust to private hands without governmental control based upon some recognized standards. Indeed, the public law in this, as in the other cases, should put sufficient limitations upon any business policy, however profitable, which comes in conflict with the fundamental principle of equal service to all applicants.

¹ 141 Fed. Rep. 1003.

² *Interstate Com. Com. v. L. & N. Ry.*, 118 Fed. Rep. 613.

³ *Interstate Com. Com. v. D. L. & W. Ry.*, 64 Fed. Rep. 723.

And it seems that there can be violation of this principle by disproportionate rates in different services as well as by discrimination in the same service.

But even if the general principle against every sort of discrimination is held to cover not only absolute discrimination when the conditions are the same, but also relative discrimination when the conditions are different, the difficult condition must be faced that, while the rule against absolute discrimination is in its nature exact and will be seen to be violated if the slightest difference is made in the rates charged to patrons asking substantially the same service, the rule against relative discrimination, on the other hand, must in its nature be inexact, for there are many elements which go to make up the difference between services really unlike, all of which must be taken into account. Whether or not the different rates charged for different services are really disproportionate is not therefore to be settled by any simple computation. Thus, in fixing the relative rates between different localities, it is obvious that it is not a matter of mileage alone, for it is well known that the cost per ton per mile tends to diminish with the length of the haul; still other elements must be considered, such as the increase in the cost of haulage by heavy grades, or the decrease in the cost by handling a dense traffic. In determining whether there is clear disproportion between the varying rates charged to different localities, all these considerations and many more must be taken into account before a decision can be made.¹

Similar difficulties are encountered in reviewing different rates upon different commodities. Obviously this is not a question of the relative values of these commodities, although that is one

¹ The federal courts have undoubtedly practically committed themselves to the general doctrine that a railroad system may make such preferential rates between different localities as are really necessary to get and hold competitive business, with the probable limitation that the non-competitive rate must not be made thereby unreasonable in itself. *C. N. O. & T. P. v. Interstate Com. Com.*, 162 U. S. 184; *Texas & P. R. R. v. Interstate Com. Com.*, 162 U. S. 197; *Interstate Com. Com. v. A. M. Ry.*, 168 U. S. 144; *L. & N. Ry. v. Behlmer*, 175 U. S. 648; *East Tenn. V. & G. Ry. v. Interstate Com. Com.*, 181 U. S. 1; *Interstate Com. Com. v. Clyde S. S. Co.*, 181 U. S. 291; *Interstate Com. Com. v. Southern Ry.*, 122 Fed. Rep. 800; *Interstate Com. Com. v. C. P. & V. R. R.*, 124 Fed. Rep. 624. But the state courts at least show some disposition to keep the railways within the limitations upon preferences between localities set by statutes. *Illinois C. Ry. v. People*, 121 Ill. 304; *Blair v. Sioux City & P. Ry.*, 109 Ia. 369; *L. & N. R. R. v. Com.*, 106 Ky. 633; *Cohn v. St. Louis I. M. & S. Ry.*, 181 Mo. 30; *Osgood v. Concord R. R.*, 63 N. H. 255. But see *Lotspeich v. Central Ry.*, 73 Ala. 806; *State v. Minneapolis & St. Louis R. R.*, 80 Minn. 191; *Ex parte Benson*, 18 S. C. 38; *Reagan v. Aiken*, 9 Lea (Tenn.) 609.

element; other factors, such as the care required in handling, the speed necessary, the equipment requisite, and the volume of business, must be taken into account before it can be said with any confidence that there is unreasonable disproportion in the relative rates. But although the rule has inherent difficulties in its application, it cannot be that in expert hands it is really impossible to give it sufficient enforcement to prevent gross injustice. And despite all outcry by railroad managers to the effect that it is practically impossible for others to determine the cost of service, it cannot be that these managers themselves, in fixing their own rates, have no principles for the determination of relative costs.¹

It is submitted, therefore, that the public service law will not be satisfied in the end unless with some reasonable degree of certainty each applicant who requires a service is charged his proportion of the total cost, including in that cost, over and above all current and fixed charges, a fair return upon proper capitalization. It must be admitted that the law relating to disproportion is still in the making; it is as indefinite as the law relating to discrimination was twenty-five years ago. A lawyer who saw no visions then would have relied upon the fact that by the weight of authority there was no law whatever against discrimination as such. Provided each applicant for the same service was quoted a rate reasonable in itself, all was then well; although outrageous differences even at that time might be evidence that the higher rate was unreasonable. In the same way today, very probably by the weight of authority, there is no law against disproportion as such. Provided each applicant for different service is quoted a rate which is reasonable in itself, it may be that there is no redress by established law, however outrageous the disproportion may be; although it seems to be agreed that outrageous differences may be evidence that the higher rate is unreasonable in itself. And yet it is quite in the line of the evolution of the public service law that a rule against disproportion as such may eventually be recognized, despite the fact that it might interfere with the business policies of the public com-

¹ In the following cases among many others a point was made of comparing the rates between different commodities, and the question was raised whether they were reasonable in relation to each other. *U. P. Ry. v. Goodridge*, 149 U. S. 680; *Interstate Com. Com. v. D. L. & W. Ry.*, 64 Fed. Rep. 723; *Fitchburg Ry. v. Gage*, 12 Gray (Mass.) 393; *Com. v. Louisville & N. Ry.*, 68 S. W. Rep. 1103 (Ky.); *Harvard Co. v. Pennsylvania Co.*, 3 I. C. C. Rep. 257; *Colorado F. & I. Co. v. Southern Pacific Ry.*, 6 I. C. C. Rep. 489; *McGrew v. Missouri Pacific Ry.*, 8 I. C. C. Rep. 630; *Re Advances in Freight Rates*, 9 I. C. C. Rep. 382.

panies even more than the present rule against outright discrimination has done. For it seems plain to the writer that the same principles which forbid any differences when the conditions are the same, should prohibit disproportionate differences when the conditions are different.

VI.

More extreme cases of the possible limitations which public duty may impose upon the business freedom of public companies remain. It sometimes happens in the course of competition between two public service companies that one of them may be bold enough to apply to the other for some facility which it requires in the conduct of its business. It need not be said that no such demand would be made in private business with any hope of success. If public calling is in question, however, why must not the company requested give the company that applies the same service which any one of the public might ask, although of course it may refuse to do anything which it might refuse to do for one of the public? For example, a railroad in course of construction may apply to a rival railroad for the transportation of material; and the case of *Rogers Locomotive Works v. Erie Ry.*¹ would seem to go even so far as to compel one railway company to forward rolling stock to a rival railroad when it is offered as freight. A more complicated case is *Owenboro Telegraph Co. v. Wisdom*,² where it was held that when the plaintiff, who was engaged in a general messenger business, had a contract with the defendant telephone company for the use of its telephone in his place of business, the defendant had no right to refuse to permit the telephone to be used in calling up the plaintiff to order a messenger sent to inform a party that he was wanted at a station of a rival telephone company.³

Although in general it may be insisted that those who are in public employment must give their rivals such service as other members of the public might require, the rule contains within

¹ 20 N. J. Eq. 379.

² 23 Ky. L. Rep. 97.

³ It may now be said to be well established that a rival company may demand the same privileges as the general public. In so far as *Jenks v. Coleman*, 2 Sumn. (U. S.) 221, is opposed to this, it must be regarded as no longer law: thus, in *South Florida R. R. v. Rhoades*, 25 Fla. 40, it was held that an agent of a rival concern could not be prevented from travelling. But it is well settled that any person can be prevented from plying trades with passengers inimical to the interests of the carrier. *Jenks v. Coleman*, *supra*; *The D. R. Martin*, 11 Blatchf. (U. S.) 233; *Barney v. Oyster Bay, etc, Co.*, 67 N. Y. 301; *Fluker v. Georgia Ry.*, 81 Ga. 461.

itself certain limitations. The principles established do not go so far as to give to one public company the right to demand the use of the facilities of another company in order to compete against it. Thus it seems plain that at common law one railroad company cannot be required to give another running rights over its rails with permission to utilize its stations, even if the applicant offers to pay a reasonable price for the privilege. Indeed, one case, *Petition of Philadelphia Railway*,¹ went so far as to hold legislation unconstitutional which gave to one street railway the right to acquire upon payment of compensation running rights over the tracks of another without its consent. The fundamental reason which permits a railway to protect itself from such demands of a rival is that it does not undertake to furnish highway facilities to the general public. Another instance from another branch of public service is to be found in *Matter of the Baldwinsville Telephone Company*,² in which a local telephone company demanded the right to utilize the long distance lines of its rival. There was even a statute forbidding telephone companies to discriminate against one another; but the judge said that under such a statute, when truly construed in the light of common law principles, there was no right to demand the utilization of facilities as part of its own system, but the petitioner's rights were to be measured by those secured to an ordinary person seeking to employ the defendant's telephone system.³

VII.

Dependent often upon public services are subsidiary businesses in the conduct of which special privileges are absolutely necessary. If those who are managing the principal employment can make

¹ 203 Pa. St. 354.

² 24 N. Y. Misc. 221.

³ A close case under this heading is whether a common carrier is obliged to accept at the rate for large packages a packed parcel made up by a rival carrier from bundles for transportation from the shipping public. It would seem that the rival is not asking service as one of the public in such cases. *Johnson v. Dominion Express Co.*, 28 Ont. 203, so holds; but *Chambers v. Pennsylvania R. R.*, 4 Brewst. (Pa.) 563, seems to hold the contrary. Upon similar principles it has been held that a water company may refuse to supply water at wholesale to the owner of several buildings who intends to resell to tenants. *United States v. American Water Works*, 37 Fed. Rep. 747. And in a more striking case still it was held that one gas company could not call upon a rival gas company for a supply to resell to consumers. *Public Service Corporation v. American Lighting Co.*, 67 N. J. Eq. 122.

such arrangements as they please with those who apply for these privileges, there is a peculiar opportunity to make additional profits. The general problem therefore arises here in another form, whether in dealing with dependent services the usual obligations of the public service law apply, or whether the management of the principal employment is free to deal with them as it sees fit, consulting only its own interests. There has been, and there remains, a square conflict of authority as to whether this law extends so far as to cover this situation. On one side are the jurisdictions conservative in attitude, which hold that there is no public duty involved and that therefore a carrier may, for example, discriminate among expressmen. On the other hand are the progressive jurisdictions which hold that public obligation is involved, and that the carrier may not, therefore, admit certain hackmen to its station while excluding others.

In the express situation the most prominent decision is certainly the *Express Cases*,¹ in which the United States Supreme Court finally decided that a railroad company might make an exclusive contract with a single express company, upon the ground that carrying expressmen was not shown to be within its public profession.² But the reasoning in the leading case on the other side of this controversy, *McDuffee v. Portland & Rochester R. R.*,³ seems more fundamental in basing the obligation to deal with all expressmen without discrimination upon the common right to equal service which all have who demand any transportation of a common carrier.⁴

However much it is modified, the conservative view of this matter cannot give the shipping public the full protection which the progressive view assures. For if the public duty does not go to the extent of preventing discrimination in performing it, it seems that little of the law of public service can be applied

¹ 117 U. S. 1.

² This view is held in *C. M. & St. P. Ry. v. Pullman Co.*, 139 U. S. 79 (sleeping-car lines); *Morris v. D. L. & W. Ry.*, 40 Fed. Rep. 101 (fast freight lines); *Pfister v. Central R. R.*, 70 Cal. 169; *Louisville v. N. A. & C. R. R.*, 146 Ind. 21; *Sargent v. B. & L. R. R.*, 115 Mass. 416; *Atlantic Express Co. v. Wilmington & W. R. R.*, 111 N. C. 463; *Fort Worth & D. C. Ry. v. State*, 87 S. W. Rep. 336 (Tex.) (sleeping-cars).

³ 52 N. H. 430.

⁴ This view is held in *New England Express Co. v. Maine C. R. R.*, 57 Me. 188; *Rogers Locomotive Works v. Erie Ry.*, 20 N. J. Eq. 379 (*semble*); *Sanford v. Catawissa R. R.*, 24 Pa. St. 378; *Pickford v. Grand Junction Ry.*, 10 M. & W. 397; *Parker v. Great Western Ry.*, 7 M. & G. 253.

between the railroad company and the express company; and it would seem to follow that any express company, therefore, may be charged extortionate prices. It may be urged that the express business itself is a public calling, and that therefore the express companies themselves are bound to give satisfactory service at reasonable rates. But their duty is relative; if they must pay extortionate prices, they may charge these against the general shipping public as necessary operating expenses. Therefore, if the whole law governing public duty is not applied between the railways and the expressmen, it would seem to be impossible in any entirely satisfactory way to protect by the law the shippers of express matter from the machinations of those who are concerned with transporting it. For even if this service thus established could be regulated to some extent, the fact would remain that competition might produce better results; at all events, it seems to be inconsistent with public duty to foster a monopoly in a necessary service.

The same problem comes up in a more exasperating form when a railroad undertakes to exclude all but certain favored hackmen from the privileges of its stations. The best reasoned case in support of this policy is perhaps *New York, New Haven & Hartford R. R. v. Scoville*,¹ where the court said in effect that this was a question of management left to the directorate of the railroad free from any coercion by law. And it must be conceded that there are many cases that hold this conservative view, that it is usually best to leave those in public employment to manage their own affairs as they see fit.² But from early times there have been men radical enough to point out that such exclusive contracts were truly inconsistent with public duty. On this fundamental ground it was

¹ 71 Conn. 136.

² The principal cases to this effect are listed below. *Louisville & W. Ry. v. West Coast N. S. Co.*, 198 U. S. 483 (wharfage); *Donovan v. Pennsylvania Co.*, 199 U. S. 272 (hackmen); *St. Louis D. Co. v. L. & W. Ry.*, 65 Fed. Rep. 39 (draymen); *Kates v. Atlanta Bag. & Cab Co.*, 107 Ga. 636 (baggage transfer); *Kelley v. C. M. & St. P. Ry.*, 93 Ia. 456 (restaurant); *Old Colony R. R. v. Tripp*, 147 Mass. 35 (baggage transfer); *Boston & Albany R. R. v. Brown*, 177 Mass. 65 (hackmen); *Godbout v. Union Depot*, 79 Minn. 188 (hackmen); *Hedding v. Gallagher*, 72 N. H. 377 (baggage transfer); *Brown v. New York C. & H. R. R. R.*, 151 N. Y. 674 (hackmen); *State v. Steele*, 106 N. C. 766 (innkeeper); *State v. Union Depot Co.*, 71 Oh. St. 379 (hackmen); *N. Y., N. H. & H. R. R. v. Bork*, 23 R. I. 218 (hackmen); *Norfolk & W. Ry. v. Old Dominion Co.*, 99 Va. 111 (baggage transfer); *Perth Station Committee v. Ross*, [1897] A. C. 479 (restaurant); *Borsum v. Hardie*, 23 Vict. Sup. Ct. 479 (hackmen); *Worcester Ex. C. Co. v. Pa. Ry.*, 2 I. C. C. Rep. 792 (palace car); *The Telephone Case*, 3 Can. Ry. Cas. 203 (pay stations).

decided in the early case of *Markham v. Brown*,¹ that an innkeeper could not make an exclusive contract with the proprietors of one line of stages that their representatives should have exclusive access to his guests. And, once established, this is a principle that goes so far as to forbid every exclusive contract which interferes with the public rights.²

Those who take the conservative position in all of these questions are prone often to rest their case upon practical convenience, assuring us that only if the common carrier be left to deal with these dependent services as the situation may demand, can these diverse problems be successfully solved in particular cases. That the monopoly system may be found to work well in particular instances does not alter the fact that there is real danger in leaving a public servant wholly without the restraint of law, and able therefore to exploit those whom it is his duty to serve.³ The time has long since passed when *laissez faire* may be put forward as the better method of dealing with the public services, for if experience in dealing with public employments is teaching anything, it is showing that only the most comprehensive law will prove effectual in the end.

VIII.

Those who are engaged in private business may conduct another business if they please, and then they may put in force policies to foster that business, many of which it is certain that those who conduct a public business may not employ to protect a collateral business. The open recognition of this law, limiting the rights of one engaged in a public employment if he enters into competition with members of the public in various businesses in which his ser-

¹ 8 N. H. 523.

² Upon these principles the numerous cases are decided which hold that equal privileges must be given. *Indian River S. B. Co. v. East Coast Transp. Co.*, 28 Fla. 387 (wharfage); *Mason D. & S. Ry. v. Graham & W.*, 117 Ga. 555 (wharfage); *Pennsylvania Co. v. Chicago*, 181 Ill. 289 (hackmen); *Indianapolis U. Ry. v. Dohn*, 153 Ind. 10 (hackmen); *McConnell v. Pedigo*, 92 Ky. 465 (hackmen); *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194 (hackmen); *State v. Reed*, 76 Miss. 211 (hackmen); *Cravens v. Rodgers*, 101 Mo. 247 (hackmen); *Montana W. Ry. v. Langlois*, 9 Mont. 419 (hackmen); *Alexandria B. St. Co. v. N. Y., C. & H. R. R. R.*, 45 N. Y. Supp. 1091 (wharfage).

³ It is needless doubtless to state the obvious limitation upon the doctrine, that where public duty is not involved, the management of a public service may make such bargains as it pleases with concessionaires, as for boot-blacks, news-stands, barber-shops, and lunch counters. *The D. R. Martin*, 11 Blatchf. (U. S.) 233; *Fluker v. Georgia Ry.*, 81 Ga. 461; *Barney v. Oyster Bay Co.*, 67 N. Y. 301; *State v. Steele*, 106 N. C. 766; *Audenreid v. Phila. & R. Ry.*, 68 Pa. St. 370; *Lewis v. W. & N. W. Ry.*, 36 Tex. Civ. App. 48.

vices are requisite, constitutes the latest development in the rapid growth of the law governing public callings. The question has as yet come before the courts for adjudication only a few times; but even the most conservative courts recognize the necessity of regulation here, while the radical courts are willing in certain instances to go to the extent of prohibition. Indeed, it is feared by many people, who are examining into the dangers affecting modern commerce from these new conditions, that unless those in common callings are held to the strictest accountability the competitive system with its market open to all is in the gravest peril. And the situation would become intolerable if those who control the destinies of trade through their ownership of the public utilities should be permitted to concentrate in their own hands the principal private businesses, which they might not inconceivably do if they were permitted to enter into general business and make use of their superior position to crush their competitors.

When a public service company is also engaged in collateral business, the temptation always is to use the power in its public business to promote its collateral business. An illustration of this was shown in *Louisville Transfer Co. v. American District Telegraph Co.*,¹ where the rather extraordinary state of affairs transpired that the defendant telephone company also operated a carriage service, and therefore had refused to permit its patrons to call the plaintiff transfer company by telephone to order carriages. The court held that it occupied the same position toward the plaintiff as it did toward its other patrons, and must therefore give the plaintiff full telephone service in the conduct of its business.² Another extreme case of unfair action may be seen in *Mobile v. Bienville Water Supply Co.*,³ where the city had constructed both a waterworks and a sewerage system, and had announced a single rate for both sewerage service and water supply, which was the same whether water was taken or not. It was held that the established water supply company might complain of this discrimination by one service in favor of the other as unfair competition, since it was the plain public duty of the city to furnish either service separately at a reasonable rate.⁴

¹ 1 Ky. L. J. 1447.

² Cf. *Electric Despatch Co. v. Bell Telephone Co.*, 20 Can. Sup. Ct. 83, and *Postal Telegraph Co. v. Hudson River Telephone Co.*, 19 Abb. N. C. (N. Y.) 46; *accord.*

³ 130 Ala. 379.

⁴ The court obviously holds similar views in *Snell v. Clinton Electric H. & P. Co.*, 196 Ill. 626, and in *Lorraine v. P. J. E. & E. R. R.*, 205 Pa. St. 132.

This development which is going on in the law was brought to the attention of all not long ago by a striking decision of the Supreme Court of the United States in *N. Y. N. H. & H. R. R. v. Interstate Commerce Commission*.¹ That case may go no further than to decide that a railroad company which is engaged in dealing in coal must charge itself its regular schedule rates or it will be guilty of illegal discrimination; but much of the reasoning of the court, if carried to the logical conclusion, would seem to forbid the railroads from taking the inconsistent positions of carriers and dealers.² And in Illinois the court long since has taken that further step in *Central Elevator Company v. People*,³ and held that it is inconsistent with the public duty which a grain warehouseman as a public servant owes its various patrons, for it to engage in the grain business and utilize its own elevator facilities in carrying it on.⁴

These are radical views that are expressed in these last decisions, but serious situations require bold solutions. It may be regarded as already conceded that if a public service company is engaged in two kinds of business, it may not do what might be done in private enterprises, — give itself preference over its rivals. Indeed it may very probably turn out that it will be decided that there is no way in which the situation can be safeguarded. When the public company has two activities, it will be content if need be with the one profit in its serving capacity, and sell its goods at cost if it must, — a sort of competition which its competitor in business cannot meet. Such being the case, it may be established that it is necessary for the maintenance of the highest type of public service to forbid entangling alliances between public services and private businesses, whenever their interests might come in direct conflict with the interests of those whom they have undertaken to serve.

¹ 200 U. S. 361.

² The Interstate Commerce Commission has several times taken occasion to animadvert upon the practices of some railways in conducting collateral business. *Re Grain Rates of Chicago Great Western Ry.*, 7 I. C. C. Rep. 33; *McGrew v. Missouri Pacific Ry.*, 8 I. C. C. Rep. 630.

³ 174 Ill. 203.

⁴ In accord is *Hannah v. People*, 198 Ill. 77, a much more extreme case, holding a statute passed to permit warehousemen to store grain in their own elevators, unconstitutional because against the general clauses in the Illinois constitution declaring grain elevators public in character.

In *Attorney General v. Great Northern Ry.*, 29 L. J. Ch. 794, this public policy was instrumental in causing the court to declare the coal business *ultra vires* of a railroad company.

IX.

That those who profess a public employment owe the utmost public service should be generally accepted as the fundamental principle upon which the law governing public employment is to be based. It is not agreed, however, how far this principle should be pressed; there is a clash of interests here, and there is an inclination on the part of those who conduct the public services to contest every issue. This is hardly an enlightened selfishness; for it seems to many who appreciate the temper of the public, that the time has come when extension of the law and enforcement of it should be the avowed attitude of all conservative persons who wish the perpetuation of the present condition of individual enterprise; indeed, the announced radical program is for government ownership of all public utilities, with its unknowable consequences. It would be well, therefore, if the restless and the doubting who see many abuses and many wrongs in the conduct of our public services without prompt remedy or adequate redress, might be relieved and heartened by being shown that the common law is adequate to deal with all real industrial wrongs, and that with the aid of remedial statutes the administration of the law can be relied upon. And it should be sufficiently emphasized at all times in all situations that public servants may not adopt to the prejudice of their public various profitable policies, and then justify them as inherent rights which other men in ordinary business may use in the advancement of their interests.

Bruce Wyman.

TRANSFER OF LAND IN OLD ENGLISH LAW.

ONE of the difficulties which ancient law has to master in its growth is the opposition offered by tribal custom to the alienation of land. Land is not originally regarded as a conveyable or transferable commodity: even after it has been appropriated by separate households some time elapses before the occupiers of the different plots and holdings acquire the right to dispose of them in the market, to give, sell, exchange, mortgage, and bequeath them. The property remains vested in the social group from which individual tenants draw the title and guarantee of their occupation. This view is the natural one in an age when the occupation of the land was effected for the purpose of hunting or pastoral pursuits, but it is maintained for some time even when the tribe, as it were, strikes root in the soil through agriculture. The claim of kinsmen to keep strangers out as to land coming from the kindred and which ought to go back to the kindred is asserted in the primitive legal customs of various tribes, and, to speak only of European nations, we find individual ownership making way against it with some difficulty in the laws of the Greeks and of the Romans, of Celts, Teutons, and Slavs.¹

One of the most powerful agencies which helped to overthrow tribal notions on this subject in medieval Europe was the influence of the law of civilized Rome when brought to bear on barbarian communities. With the help of the Church and of kings, who in consequence of their exalted position were quicker to realize the advantages of the new order, Roman ideas and forms made their way against ancient custom, and in the struggle in regard to the right of alienating land one of the most important steps was the introduction of written instruments framed on Roman patterns to convey title. The history of *bôcland* in England is one of the varieties of the gradual transformation of land law in this direction,² and it finds its parallels on the continent in the use of "formulæ"

¹ I will content myself with referring to P. Viollet, *Histoire du Droit Civil Français*, 3^e éd., 555 ff.; Brunner, *Deutsche Rechtsgeschichte*, 2 ed., i. 281; Blumenstock, *Entstehung des Immobiliareigenthums*.

² On *bôcland* see a paper of mine in a forthcoming volume of essays dedicated to Professor Fitting.

of Roman origin which provided the models for Frankish, Germanic, and Lombard conveyancing.

On the continent we notice, however, that by the side of the deeds of Romanistic origin other forms of transfer are developed, which remain in closer touch with native legal custom and are evidently more suited for country life than the elaborate and costly productions of royal chanceries and ecclesiastical scribes. In Frankish law, for instance, although the Salian Code does not even mention written deeds like those illustrated by Marculf or executed by Merovingian kings and bishops, it describes at some length a ceremonial process by means of which a person could pass over his household property to another.¹ This was done in a solemn way, in the presence of neighbors, by the act of throwing a stick into the lap of a middleman, who entered into possession and acted as the master of the house by treating guests to a meal of porridge. Ultimately he delivered the house by throwing the stick into the lap of the intended donee. The procedure described is not merely a quaint local custom; it gave rise to a continuous tradition of legal formalities which seems reflected, among other things, in the surrender and admittance practices of English manorial courts.² Evidently there was frequent occasion for the use of such ceremonial acts in every-day practice.

There can be hardly a doubt that similar customs obtained in Old English law by the side of the book-right conveyances initiated by royal privilege. It cannot be assumed that alienations and transfers of land were carried on exclusively by means of written documents in the case of the small freemen of Lincolnshire or East Anglia, who, according to Domesday evidence,³ had power to do with their land what they pleased. As, however, our materials are almost exclusively drawn from books, we need not wonder that we hear very little about the less "bookish" forms of transfer. They consisted probably in ceremonial actions *by word and deed* among which the handing over *by word and deed* and *Farsheved*, Hunts, which occurs in the Domesday Book, is a prominent part.⁴ But otherwise second the MS. omits *Jacesle* and *Faresheved* as to the proceedings, and now we know from the Peterborough MS. of the

¹ Lex Salica, 46.
"affatonia" to do

² Villainage

³ Cf. Mai

⁴ Brun
deutsch

received the designation of *Burgh*, *Burgus Sⁱ Petri*, of the fortifications constructed by Abbot Kenulf, *Æl-*
D. 963), so that the word "*Burgh*" must have been
the transaction by a later hand. It occurs again in the
th (Cart. Sax., iii. 372).

uted to Edgar (Cart. Sax., 1258, 1280). The document of
e and affecting the form of a dialogue between King Edgar
is hardly more genuine.

in the doctrines as to title in Anglo-Saxon law may perhaps be ascribed.

It is unfortunate under these circumstances that an interesting Old English document throwing light on the customary mode of transfer of land and suggesting obvious comparisons with the legal practices of neighboring nations should have been as good as overlooked by students. The document I mean belongs to the Peterborough evidence, to which we owe so much valuable information about Saxon and Norman antiquities,—especially the Northamptonshire Geld Inquest, published by Ellis, and the Survey of 1125, published by the Camden Society.¹ The same Codex 60 of the Society of Antiquaries in London, which contains these historical materials, gives an account of some dealings of the Bishop Æthelwold of Winchester directed towards the restoration of the Mercian monasteries, destroyed by the Danes, at some time about 963-972. Kemble published only one of the entries of this account,²—the picturesque story of the land confiscated by the king after the drowning at London Bridge of a woman guilty of practising pin-sticking charms. Another fragment from the same source³ had been given in the 1817 edition of the *Monasticon Anglicanum*. It treated of the resumption for Medhamstead of the old site of the monastery and one or two other estates. But the bulk of the account was published by W. de Gray Birch.⁴ In any case all the statements of this account have been before the public since 1893, and the fragments printed in the *Monasticon* and by Kemble since 1817 and 1848; but, unless I am much mistaken, their legal contents have never been commented on, although they have an evident bearing on several problems which have been lately much discussed by lawyers and antiquarians.⁵

I do not think such complete neglect would have been justified, even if the document in question were proved to be a forgery. Right of alienating *favories* are quite as valuable for institutional introduction of written instruments because the falsifiers had to convey title. The history of *bôcland* established formulæ in order to rieties of the gradual transformation of it is not the particular and it finds its parallels on the continent in u.

¹ *ibid.*, 1849, vol. xlvii.

² I will content myself with referring to P. Viollet, *Histoire du D.* 3^e éd., 555 ff.; Brunner, *Deutsche Rechtsgeschichte*, 2 ed., i. 281; *Bestandtheil der Stellung des Immobiliareigenthums*.

³ On *bôcland* see a paper of mine in a forthcoming volume of essays *Northampton*. Professor Fitting.

interests but the general legal frame that is of importance for us. But there does not even seem to be any ground for doubting the genuineness of the narrative in question. It has come down in a twelfth century transcript, and in one or two cases the copyist may have touched up the older text by introducing a familiar local name.¹ But in other respects there are no external traces of falsification about the narrative, and it contains on every line statements speaking for its genuineness. It is not one of the pompous charters manufactured to establish ecclesiastical claims, of which so many have come down to us from nearly every see and abbey, and of which there are conspicuous instances among the records of Peterborough.² It is, on the face of it, a compilation of memoranda for private use bearing on the estates and the movable property of the monastery, and not likely to impress any court in a struggle as to title. The contents of these memoranda are exceedingly disparate; besides short notices about purchases, grants, and exchanges of land, there occur entries about the books bequeathed to the abbey, precious objects of ecclesiastical apparel (*madmas*), inventories of stock on one or two of the estates, and notices as to the number of laborers on them. A great many of these memoranda had no practical value for anybody but the monks themselves, and not much interest for people who were not contemporaries. What use could be made for any iniquitous purpose of the fact that the library of Medhamstead possessed a copy of a *Liber Bestiarum* or an exposition of Hebrew names, or that there were 305 sheep and a harrow in Yaxley at some not specified time? And even the records of transactions as to land derived their practical importance only from references to men and institutions which could stand witness and security in regard to them: they do not lay claim to any formal authority. As a matter of fact the genuineness of characteristic parts of the

¹ In the entry about the sale of land at Yaxley and Farsheved, Hunts, which occurs twice (*Cart. Sax.*, iii. 368 and 370), the words "*into Burch*" are introduced in a pleonastic way in the first instance. In the second the MS. omits *Jacesle* and *Faresheved* and speaks of land *at Burch*. Now we know from the Peterborough MS. of the Chronicle that Medhamstead received the designation of *Burgh*, *Burgus Sⁱ Petri*, Peterborough, in consequence of the fortifications constructed by Abbot Kenulf, Ældulf's successor (*Sax. Chr. A. D.* 963), so that the word "*Burgh*" must have been introduced into the record of the transaction by a later hand. It occurs again in the document relating to Ailsworth (*Cart. Sax.*, iii. 372).

² *E. g.*, the charters attributed to Edgar (*Cart. Sax.*, 1258, 1280). The document of 972, inserted in the Chronicle and affecting the form of a dialogue between King Edgar and Archbishop Dunstan, is hardly more genuine.

memoranda has been assumed without any contradiction.¹ And if we may use them in forming a view as to the contents of a monastic library, or as to a piece of folk-lore, like the charm of pin-sticking, there is no reason why we should not use them for the purpose of ascertaining legal customs and economic conditions.

The data provided by the memoranda, though they will help us to clear up obscure and doubtful points, do not clash in any way with facts ascertained on the strength of other evidence. I will speak in the present paper only of the information they supply on the modes of transferring land, and, incidentally, on the contact of Old English and Scandinavian law revealed by our document.

Bishop Æthelwold of Winchester, and Abbot Ealdulf, who acted with him for the restoration of Medhamstead, did not draw up "books" in order to formulate and confirm their transactions with various persons of whom they acquired land for the purpose in view. They recorded their dealings in writing, but the records in question were private notices or memoranda about proceedings which had taken place in court or before witnesses, and the interest of these notices lies in the fact that they give us some particulars about the forms and conditions observed in such cases.

It ought not to be overlooked that the wholesale restoration of property and rights, under pressure of King Edgar's power, must have involved some kind of expropriation for the benefit of the monastery, and that the sales and exchanges effected were concluded under extraordinary circumstances, sometimes perhaps with a more than usual display of public machinery. Yet it is highly improbable that the forms used should have differed substantially from the ordinary modes of transferring land. However one-sided an affair these bargains may have been, they had to conform to the ordinary requirements of *bonâ fide* bargains in order to avoid any pretext for a subsequent breach or reversal of the transactions. The materials supplied by the record concern mainly three points: the action of the parties to the transfer; the part played by witnesses and sureties; the intervention of public courts.

1. Most of the transactions referred to are purchases of land. In twenty-four instances land is expressly said to be bought or sold, while in five, though the fact of purchase is not mentioned, the transaction alluded to can hardly have been anything else but

¹ *E. g.*, Plummer, Notes to A. S. Chronicle, ii. 155.

this most common one. In two cases the transfer of property was a consequence of forfeitures incurred by criminals, one refers to a grant, one to an exchange, and one to a grant combined with an exchange. Thus references to sales form the bulk of the Peterborough memoranda. Let us remember that proper deeds of sale do not occur in the collection of Anglo-Saxon land books. Although written instruments very often treat of transactions based on purchase, the form of a contract of sale was not used by the Anglo-Saxon clerks. The transaction took the shape of a grant, with an occasional mention of a certain sum paid by the buyer.¹ In the case of the Medhamstead memoranda the ceremonial transactions recorded are emphatically sales. Their technical designation is *landceap*.² We possess a law of Æthelred of 997 enacted at Wantage, that "*landcop*" should stand as well as the lord's gift, "*lahcop, witword*," and "*gewitnes*."³ The law of the Northumbrian priests repeats this enactment, adding some other items, "*drikkelaun, riht dōm, fulloc, frumtalū*."⁴ We need not dwell on all the details of this enumeration of legal acts that "should stand." It is important to notice that a new departure is sought in regard to them, — matters which may have been doubtful or insufficiently secure before were to be guaranteed for the future. The intention was evidently not only to reassert the power of existing laws, but to confirm the legal value of customs which were yet new and not sufficiently recognized in England. Where these customs mostly came from is made clear by some particulars of their list. *Witword* is a technical Norse term: it means the assertion of a right by a party to whom the way to such assertion is legally open: ⁵ a party substantiating his claim by an oath, a party to whom the privilege of proof has been conceded,

¹ For a characteristic instance of a donation subsequent to a sale, see Cod. Dipl., 282 (A. D. 859), Brit. Mus. Facs., ii. 34. To "sell" in Old English was simply to give or to grant. Cod. Dipl., 226 (Earle, Landcharters, 80).

² On *pissum ge write cyð hwet þa festermen synd þes landes ceapes þe Adeluuld C. gebohte æt mislicum manum ut on Wiðeringa eige* (p. 370).

³ Æthelred, iii. 3 (enacted at Wantage, about 997).

⁴ Northumbr. pr. l. 67, § 1.

⁵ Amira, Nordgermanisches Obligationenrecht, i. 91 ff. The explanation adopted in the text is mainly supported by the use of the word in Swedish laws (*cf.* Schlyter, Sveriges Gamle Love, Glossar. s. v. *vitsord*). The Norwegian, Danish, and English use was more lax. Steenstrup, Danelag, 188; Hertzberg and Bugge, Norges Gamle Love, V. s. v. *vitorð*. Still the term has to be kept distinct from the meaning of "testimony," as it is contrasted with *gewitnes*. *Cf.* Lieberman, Glossar. to the A. S. Laws, and Bosworth and Toller, A. S. Dictionary, s. v.

possess the *witword*, and such *witword*, if successful, ought to stand. *Lahcop* is the Danish word for reintegration to one's lawful standing by the payment of a fine. It is the counterpart of the Danish *lahslit*. Not less specific is the *drikkelaun*, introduced by the Northumbrian priests: it finds its best explanation in the Norwegian Gulathing's Lov, 270, where it appears as one of the modes creating title to odal land: it is derived from the king's grant in recompense for hospitality on a royal progress.¹ The *gewitnes*, lord's gift, and *landceap* are not so specifically Scandinavian; but yet this latter, which mainly concerns us, appears in Æthelred's law, not in its English form, but in the Norse — *landcop*. It looks as if the enactments in question were the result of a policy of legalizing the conditions under which the Danes were settling in the island. That these decrees were not mere words may be gathered, *e. g.*, from a charter in which land acquired by Archbishop Ealdred is classified under the two heads of *witword* and *caupaland*, — land successfully claimed, or bought by him, as I should like to translate it.²

To revert to our document, it presents a copious collection of cases illustrating the practice of *landceap*. How far this practice went back to Old English roots and to what extent it was the result of Scandinavian influence, it would be impossible to tell, but in the Northamptonshire document before us it certainly appears in Scandinavian surroundings.³

The payment of a price is sometimes mentioned in the memoranda and sometimes omitted.⁴ On one occasion we are told that the price was paid by instalments, and the transaction was apparently held to be perfected by the payment of the "last money."⁵

¹ Steenstrup, Danelag, 186.

² Thorpe, Diplom., 439.

³ The Codex 60 of the Society of Antiquaries contains a charter in which the expression "*to fullon ceape*" occurs, f. 50, d. "Ðis is seo feorewearde þe Vlf and Madselm his gebedda worhtan wið and wið S^ce Peter þa hig to Ierusalem ferdon. Ðat is þat lond æt Carlatune into burh . . . and þat land æt Bytham into S^ce Guthlace, and þat land æt Sempringaham into S^ce Benedicte to Ramesege, and þat land æt Lofintune and hætt (*sic*) heordewican Ealdrede biscope to fullon ceape. . . . and lindbeorghe habban mine cnihtas gif ic ham ne cume." The bishop Ealdred is probably the well-known Archbishop of York, and the document quoted may have been drawn up sometime in the sixties. Thorpe, Diplom., 594.

⁴ *E. g.*, "þa bohte man æt tuce and æt hire sune clacce 60 aecera aelc mid x pene-gum." But an entry may also run: "Ðis synd þa festermen þe Æincund funde Ældulfe ab. æt þan lande æt Anlafestune þa he æt him bohte," etc.

⁵ P. 368: "Ða Æpeluuiue eðe aldorman and Æaldulf biscop sealdan Æthestane and

The formalities of tradition are not described in these private notices. From the fact that books frequently mention a symbolic investiture by the sod, which has no necessary connection with the drawing up of the book, it may be gathered that the delivery of the sod was the characteristic symbol of tradition in the *landceap*. It occurs both on the English¹ and on the Scandinavian side. In Denmark as in Sweden, in Norway as in Iceland, the regular act by which the ownership of land was transferred, in consequence of a grant, sale, or exchange, was the *skötning* (*skeyting*),²—the placing of a sod into the lap of the person acquiring the property, an act reminding us forcibly of the *in laisum jactare*, the throwing of a stick into the lap of the grantee, in Frankish law. Tradition by passing the sod occurs in English charters of the period preceding the Danish invasions, and we have to consider it, not as an importation from Scandinavian parts, but as a ceremony common to both nations, and probably going back to early Teutonic roots.³

In one case the person selling land acts with the consent of his brothers,⁴ but in most instances relatives are not mentioned, and it is evident that their intervention was not required to render the transaction valid. The form of transfer of property under discussion implies already an emancipation from the strict rules as to the claims of family and kindred excluding the power of disposal by individual owners. It belongs to a more modern stage of social evolution than the régime of strict settlement under *mægths* which prevailed in the ancient law, and against which the early books were directed.

The connection between outlawry and transfer of land is not quite obvious on the face of the records. In one case the land belonging to the widow and her son who practised pin-sticking fell to the king; the latter granted it to a thane, and this thane exchanged it against another estate given by Bishop Æthelwold.⁵ So far there is no difficulty. But in two other cases estates are not said to fall

Alfwolde for Jacesle and Faresheved pone latostan pænig . . . þa ueron þer fester-men," etc.

¹ *E. g.*, Cod. Dipl., pl. 114 (A. D. 759-765).

² Steman, Dansk Retshistorie, 465; Hertzberg and Bugge, Glossar. in Norges Gamle Love s. v. *skeyting*; Beauchet, Histoire de la Propriété Foncière en Suède, 255, 330. Amira, Nordgermanisch. Oblig., i. 512 ff.; ii. 625 ff.

³ Heusler, Institutionen des deutschen Privatrechts, ii. 70.

⁴ P. 369: "Ðis sind þa festermen þe Friðolf and his brodra fundel (*sic*, corr. *fundon*) Ældulfe aþ æt þat lande æt Waltune."

⁵ Cart. Sax., 1131, p. 372 f.

to the king in consequence of outlawry, as they would have done according to the later law of Canute II. 13. The action of the persons passing the estates to the bishop is characterized by the terms *geald*, *guldun*: they "pay in" such and such an estate for an outlawry.¹ The outlawry itself is said to be "wrought" on some one — Wulfnod or Styrcyr. The expression "outlawry" (*útlagu*) is thus used loosely for a crime involving outlawry, and the transfer of the estates may have been made to pay off a fine — the *wergeld* in the case of Styrcyr. But why should Bishop Æthelwold receive such fines? It is hardly to be assumed that he got them as a relative of the slain, or even as a lord. It seems that we have in this case a parallel to the anonymous memorial, most probably drawn up by an ecclesiastical magnate, in which the author tells of his intercession in favor of an outlaw, Helmstan, who had stolen oxen: the estate of the latter passed to his protector by the favor of the king.² There can be no doubt that the activity of the Bishop of Winchester in 963 was greatly patronized by King Edgar, and such patronage may account for the transfer of estates to Bishop Æthelwold by men who had incurred outlawry and wanted to clear themselves with the help of the bishop.³

Of an estate at Wermington it is said that it had been acquired wrongly by a certain Ælfweard, who made a declaration (*swutelung*) in agreement with Abbot Ealdulf that he should hold the said estate during life, and that after his death it should go to St. Peter for the sake of his soul. This agreement is said to have been corroborated by a pledge (*on his wedde gesealde*).⁴ It must have concerned land which in one way or another was claimed by Medhamstead,

¹ "Ðis sind þa festermen þa Osgot funde Ealdulfe ab. æt þet lande æt Castre, þe he geald him for þam utlage þe he Styrcyr ofslogh (p. 369). Ðis sind þa festermen þe Wulfgeat and Gyrping fundon þam ab. Ældulfe þa hi þat lande guldun æt macusige for ðan utlage þa he on Wulnoðe worhte" (p. 370).

² Cod. Dipl., 328.

³ It may be added that the Codex 60 of the Society of Antiquaries, p. 7, has other references to the surrender of estates in consequence of outlawry treating of events which happened about the time of the Conquest: f. 55, v: "Keteford occidit quendam Ulkytellum et pro hac forisfactura terra et silua sua fremeuuda peruenit in manu abbatis de burch. . . . Medietas silue de Copeuude et quarta pars alterius medietatis abbatis est de burch. Hæc quarta pars fuit Ægeluuardi cuiusdam, sed pro furto quod fecit in manus abbatis uenit. Et de tribus remanentibus partibus tercia pars est abbatis quæ fuit Vlf latronis."

⁴ "Ðis is seo swutelung þe Ælfweard on dentune wroðte wið Ealdulf aþ þa he him þat land agæf æt Wermingtune þe he on woh genumen hæfde . . . and on his wedde gesealde þet land æt Wermingtune æfter his dæg into Sancte Petre for his saule on hyra gewytnesse" (p. 372).

but had got into the hands of powerful laymen. From the point of view of the monastery the latter held it wrongly, but an agreement had to be made in this case, as in many similar ones, and the church contented itself with securing the reversion of the estate, while conceding a life interest in it to its opponent.¹ The most interesting point is that the layman not only makes a grant, but confirms it by a pledge or promise (*on his wedde*). The expression *wedd* is characteristic in this context. It fits especially the case of ceremonial promises not committed to writing.²

2. One feature which recurs in nearly all the Medhamstead memoranda is the enumeration of *fester*men, of persons called up to participate in the transaction. The act of getting these *fester*men is described as *feste*, corroboration. The grantor or seller finds *fester*men for the donee or the buyer, while the latter is said to take *feste*.³ These expressions lay stress on an act of confirmation by special sureties entirely distinct from the drawing up of a deed, or from the promise (*wedd*) of the principal. The function performed by the *fester*men is not identical with bearing witness: witnesses are mentioned, but their testimony is kept apart from the action of *fester*men.⁴

The term *fester*man is sometimes replaced by others — *borh*, *boruhhand*⁵ — which leave no doubt as to the main function of

¹ Cf., e. g., Cod. Dipl., 156.

² Cod. Dipl., 314 (K. Alfred's will): "and hi ealle (The West Saxon witan) me ðæs hyra wedd sealdon and hyra handsetene." Earle, Landcharters, 231 (Canute's proclamation): "hit swype deor (sy) wið God to betanne, æt man aðas, oððe wedd tobrece."

³ In several of the entries already given *fester*men occur. The first case of the memorandum on p. 369 may serve as an illustration of the "*feste*."

It will be noticed that Sumerlyda the priest appears both on the side of those who take the "*feste*" and on that of those who "find" it.

⁴ In the Warmington instance quoted above several persons are named who appear as *fester*men in other cases, — Frana, Osferð, Sumerlyda priest, etc. Yet there is no talk of "*feste*," but of "*gewytnes*." This goes well with the fact that in this case the memorandum treats of an agreement or declaration (*swutelung*) and not of a sale. In another instance where *fester*men occur, their action is distinct from that of a moot of three hundreds which witnesses the transaction, p. 370: "Ealdulf, aþ and Alfuold bohton oðer healf hyde," etc. The same distinction is observed in the case of Eston (p. 370), Bainton (Badington) (p. 371).

⁵ P. 369: "Dis synd þa fester

men þe Friðolf and his brodra fundel Ældulfe aþ æt pat lande æt Waltune . . . þonne is þer *borh hand* Frena and Wulnod Clacces Sune, and Ætlebrant æt pilesgeate, and Cnut and Styrceyr on Uptune, and Boia on Mylatune, and Drabba his broðor. . . . Four and twentig æcere is þes wudes, and xxii hæredlandes buton oðrum gemænum þe Ealdulf aþ gebohte æt Cyneferðe, and wes Vif doddes sune borhhand and Eincund and siððon eal Wepentac, and æt Hungife 20 æcera, and wes Eadric litle borhhand, and Fastolf preost, and Orm. p. 371: Dis synd þa *borh-handa* þe Swuste and hire dohter funden Ældulfe aþ æt oðre ælfe hyde æt Lunding-

festermen: they stand pledged to act as securities in regard to the transfer of land. In what concrete forms such pledges were made good, what responsibility was incurred by the sureties, we do not know, but the principle itself is clear and important enough. Third persons intervene in cases of sale or exchange: they vouch for the validity of the title transferred. The number and quality of these sureties are not established by a uniform rule: they are three or more, up to eight or thirteen, and we have no means of judging why their numbers get increased or lessened. The names of the same *festermen* recur very often in different cases, as those of influential witnesses of charters might do: Frena, Osgod, Hudeman, are mentioned again and again. Some of these names are Saxon, but many are Scandinavian, — Sumerlyda, Styrceyr, Thúr,¹ etc.: Ulf might suit both nationalities. It is not without meaning that with many of these names places are connected. This shows that the *festermen* were mostly taken, not from the population of one or other particular township, but from places scattered sometimes over several hundreds in Northamptonshire, and possibly even in an adjoining county, *e. g.*, Huntingdonshire.² We shall hardly be mistaken in seeing in these people representatives of influential county families.

The *festermen* are chosen or "found" by one of the contracting parties, the one transferring title, and they must have acted to a certain extent as his personal friends, or at any rate as persons willing to assume responsibility in a transaction initiated by him. In one instance a man who "takes the *feste*" on behalf of the buyer appears at the same time as one of the *festermen* found by the seller, — an indication that the fact of being a *festerman* did not involve a one-sided partiality in favor of one of the parties concerned.

tune, p. 369. Ða Ealdulf ab bohte þane toft æt Godinge on Waltune, þa was him boroh Ulf, and Eincund, and Grim on Castræ."

¹ Sumerlyda, *e. g.*, is a name which occurs in the family of the Lords of the Isles. It means literally the "summer soldier," the warrior engaged on a summer campaign. My attention has been called to this coincidence of names by my friend Rev. C. Plummer.

² Of the thirteen *festermen* of the first entry on p. 369, intervening in a sale in Warmington in the hundred of Wilebróc, the first comes from Aschurch (Asencirce) in the hundred of Naresford, the second from Denton, hundred unknown, the third from Stoke, in Pochbróc, the fourth from Byrnewell, Pochbróc, the fifth from Finnesthorp (?), the sixth from Lullington (Luddington), in Pochbróc, the seventh from Southwick, in Wilebróc, the tenth from Elton, Hunts, and the eleventh from Cattworth, Hunts.

There is a curious connection between the action of the individual *festermen* and that of a *gemót*. This last may itself be described as standing pledge (*borhhand*). It comes in, as it were, as a higher instance in the same process of providing security for transactions.¹

The *feste* was meant to confirm the validity of the transfer and not to ensure its execution. Therefore land could be guaranteed to be "clean,"² or, as we should say, the title to the land could be pronounced to be unobjectionable both by individual sureties and by the *gemót*, while the delivery of the estate according to agreement could not concern the *gemót* otherwise than in the latter's judicial capacity. There is, moreover, an indication of the fact that sureties had to be given to guarantee the transaction on behalf of the kindred, the *mægth*, of the seller.³ This is a very important feature, as it discloses the principal object of the institution: it was necessary to provide against the action of relatives trying to contest the alienation, and the best means for guarding against such attempts was evidently to obtain securities from the kindred itself.

Festermen occur once or twice in Anglo-Saxon evidence outside our document; they are mentioned as sureties for good behavior in the case of the appointment of a priest, in the law of the Northumbrian priests.⁴ But the most interesting coincidence is again presented by Scandinavian law. The *feste* is a necessary element in the transfer of land, and other important contracts, in Swedish law.⁵ The *fastar* appear in full court at the invitation of the seller or the donor; they have to see, and to proclaim, that the law has been followed strictly in every respect. Their prolocutor, the *forskiälamaþer* or *skilaman*, speaks in their behalf and pronounces the formula concluding the transaction. And what is more, there is the same relation between the action of the *fastar* and that of the public court as in England. Indeed, the president of the latter, the *härads hövding*, for instance, may be called upon to take the part of the *skilaman*,

¹ P. 369: "þa Elfric ealdorman bohte þat land æt Leobrantestune æt Frenan on ealles heres gemote on hamtone þe wes eal se here *boruhhand* clenes landes."

² Thorpe, *Diplom.*, 338: "Ða astód Ðurcil Hwita up on þam gemóte, and bæd ealle þa pegnas syllan his wife þa landes *clene* þe hire mæge hire geúðe, and heo swa dydon, and Ðurcil rád Ða to S^ce Æpelberhtes mynstre, be ealles þæs folces *leðfe* and *gewitnesse*."

³ P. 369 (Beringafeld).

⁴ North. pr. l. 2. Cf. Steenstrup, *Danelag*, 381, 382.

⁵ Amira, *Nordgerman. Obligationenrecht*, i. 274 ff.

or prolocutor. In Norwegian and Icelandic law the process was not developed with such elaborate completeness as in Sweden. Still, in a less sharply marked form, we may recognize the *fester-men* in the *vitnar* of Norwegian and Icelandic law, — who sometimes act as sureties called up to guarantee the validity of transactions.¹ Indeed, in the case of one contract, that of marriage, the *feste* still kept a form analogous to that presented by the transfer of landed property. Right marriage is concluded by a *fæstermál*, an act of confirmation, in which the relatives and friends of the contracting parties play a prominent part; one of them acts as *forspreka*, prolocutor. Nor is it to be forgotten that the wedding of old English law appears as the same kind of ceremonial contract in which not only *weds* are exchanged, but which is settled with the help and confirmation of friends standing surety. One of these, on each side, is emphatically a prolocutor, a *forspeaker*.²

In Danish law these features of customary contract are even more attenuated than in Norwegian and Icelandic legal custom. The *skötning* before the *thing* in cases of land transfer, and the participation of kinsmen and friends backing both sides in the case of wedding, are, however, still clearly perceptible in this variety of Scandinavian law.³

3. In nine of the cases of transfer recorded in our memoranda we are expressly told that the sale or exchange took place in a *gemót*. Generally the *gemóts* mentioned are those of hundreds, or rather of combinations of hundreds. Twenty acres of wood and field were sold before a moot of two hundreds at "Dicon"⁴ (at the dyke, or at Dykham?). As the plot lay in Badington, — Bainton near Bernack, — the moot in question must have been that of the double hundred of Næseburgh or Uptongreen, in the farthest northeastern corner of the county, by the monastery.⁵ A double hundred is mentioned once more in connection with a sale of some land in a place called Anlafestune. The same *gemót* is spoken of as that of a *wapentake* in the case of a minor sale.⁶ As a matter of fact the Næseburgh hundred, lying on the border of Lincolnshire, was

¹ Amira, o. c. ii. § 26.

² *Wifmannes bewedding*. Liebermann, Gesetze, i. 442.

³ Madsen, Dansk Retshistorie, ii. 30.

⁴ Cart. Sax., iii. 370.

⁵ P. 371.

⁶ Victoria County Hist. of Northamptonshire, i. Cf. Hundred and Wapentake of Wiceslea, Dd. i. 220 b.

commonly treated as a *wapentake*. The varying designation of the division by a Saxon and a Scandinavian term, it may be said in passing, is in itself characteristic of a district which had been strongly held by the Danes, and where Scandinavian influence manifests itself in a number of facts.¹

Combined moots of three hundreds are mentioned twice. One of these was held at a place called Withred's Cross, and, to judge by the village where the land was sold and the names of the witnesses, it must have been a court held jointly by the hundreds of Naresford, Wilebroc, and Pochebroc.² The same court was seemingly meant in the case of the purchase of one hide and a half in Swift (?). It is said to have met at Oundle, in the hundred of Pochebroc.³ Oundle is mentioned in two other cases as the seat of a moot of eight hundreds.⁴ This moot is also said to have been assembled once at Wermington in the hundred of Wilebroc. The jurisdiction over eight hundreds is one of the great features of the franchise of Peterborough in feudal times. The abbey held a court for the hundreds of Wilebrook, Pochbróc, Naresford, Hocheslau, Ordinbarrou, and the double hundreds of Næsseburgh and Neveslund.⁵ The "eight hundred" franchise is insisted on in the spurious charter of Edgar entered in the MS. of the Chronicle, and there may be some doubt whether the references to the eight hundreds may not be misplaced corrections of the twelfth century copyist in instances where his authority, the original memorandum, spoke of moots of three hundreds, as in one of the Oundle cases (VIII instead of III). But similar combinations of several hundreds occur elsewhere, quite apart from any ecclesiastical franchise.⁶ The matter must be left to antiquarians to decide: for our purpose the courts of three hundreds are as characteristic as a court of eight.

¹ It is noteworthy that the numerals presenting combinations are often expressed in the Northamptonshire geld roll according to the Danish and not the English system. *Spelkoh* hundred, e. g., is said to contain "*foursydene tuenti hydes.—firsindstve,*" or "*firs,*" as a Dane would say nowadays. The Old English would have been *hundeachtig* or, shortened, *achtig*. Upton grene is numbered as "*fifsydene twenti hides*"—"fems." Ellis, Introduction to Domesday, 184 ff.

² Cart. Sax., iii. 370.

³ "Ib. Ealdulf ab and Alfuold bohton oðer healfe hyde æt Swifte mid eahte pundun. þonne sind festermen . . . on þeræ preora hundred gewytnesse into Undelum."

⁴ P. 369 (Beringafeld); p. 371 (Badingtun; Lundingtun).

⁵ Cf. Bridge, Hist. of Northamptonshire, ii. 489 a.

⁶ E. g., a moot of ten *wapentakes* in Lincolnshire. Bracton's Notebook, pl 1730. Cf. Chadwick, Studies on Anglo-Saxon Institutions, 249 ff.

In one remarkable case the witnessing body is the shiremoot assembled at Northampton under the designation *ealles heres gemót on Hamtone*, the moot of the whole *here* at Hampton. The Scandinavian *couleur locale* of Northamptonshire is drastically expressed in these words. The Danish *here*, though subdued by Edgar, had still retained its peculiar cast and name, and it is only natural that many features of legal custom within its jurisdiction should receive their explanation rather from Scandinavian than from Mercian or West Saxon law.

Once the memorandum gives the text of a notice as to an exchange of lands between Bishop Æthelwold and Wlstan "Uccea," in consequence of which Peterborough Abbey got an estate at Ailsworth in the hundred of Næsseburgh. The transaction was witnessed by the king and his *witan*, and recorded in a written declaration (*swutelung*) of a kind which is not uncommon at that time.¹

The action of these assemblies is described sometimes as "witnessing," but in two cases, namely those of the *shiregemot* and of the *wapentake*, the moots "stand pledge" (*borukhand*) to the transfer of land.² The combination of standing witness and standing security reminds us of a similar accumulation of legal features in the case of written deeds, in which the witnesses (*testes*) appear usually as consenting and corroborating parties.³ It is not merely an "insinuation" as required by later Roman law,⁴ a registration by an assembly wielding local government power. The publicity of the proceeding and its committal to the memory of the members of the court were certainly an important feature. But the *shiregemot* is distinctly said to vouch for land being "clean," and this shows that it decided as to the title itself. This is easily explained by the fact that the public moots were the ordinary centres of voluntary jurisdiction, and at the same time had to lay down the law in case of litigation. The best way to be on the right side in case of the latter was to obtain from the very beginning a declaration of the moot.⁵

¹ Cart. Sax., 371, n. 1131.

² P. 369: "and he bohte æt Orme XII æceras and was Vlf borhhand, and Eincund and siððon eal wepentac."

³ Cf. Maitland, *Domesday and Beyond*, 250.

⁴ Girard, *Manuel de Droit Romain*, 937.

⁵ An interesting example of such a preliminary declaration is afforded by the case described in King Alfred's will, Cod. Dipl., 314: "Ða lædde ic Aðulfes cinges yrfegewrit on úre gemót æt Langandene, and hit arædde beforan eallum Westsexna

Towards the close of Anglo-Saxon history it appears as a rule that any change of land ownership should be made known to the county or to the hundred. The hundred *gemóts* and the shires at the time of the Domesday Survey constantly refer to their having received, or not received, writs, or signet, or message, in regard to the tenure of such and such an estate, and some of these references apply to the reign of King Edward.¹ This means that even books and royal commands had to be produced before the shire or the hundred *gemót* in order to secure title. The inference would be that folk right transactions were even more bound up with formal acts and declarations in public courts.

In this connection it is impossible to disregard the fact that publication at a *thing*, "*tinglysing*," was one of the requirements for the validity of all transactions conferring land ownership in Scandinavian law.² The main point in conveyancing in Denmark, Norway, and Sweden was to bring the matter through the popular court in order that there should be a chance for the assertion of any interests hostile to the proposed transactions, and that its ultimate conclusion should be witnessed and declared to be according to law by popular authority. In a sense this form presents the exact counterpart of the action of the public notary in countries where there existed the institution of the public clerk, watching over the regularity and soundness of transactions. In this case the place of the authorized notary is characteristically taken by the *gemót* or *thing* and by its presiding officer, the *hövding*, to whom the sheriff or hundredman would correspond in English practice.

It would be impossible to say, however, on the strength of our evidence, how far the co-operation of the moot was obligatory in England in the second half of the tenth century. The Medhamstead memoranda would, if construed strictly, speak against its necessity, because, although they evidently lay great weight on the presence of the court, they mention it expressly only in nine cases out of thirty-four. It might be pleaded perhaps that the

witum. Ða hit aræd waes, Ða bæd ic hy ealle, for minre lufan, and him min wedd beád Ðæt ic hyra næfre nænne ne oncude forðon ðe hy on riht spræcon, and Ðæt hyra nán ne wandode ni for minum lufan ne for minum ege, Ðæt hy Ðæt folcriht árehton . . . and hy Ða ealle tó rihte gerehton and cwadon, Ðæt hy nán rihtre riht gepencan ne mihtan, ne on Ðam yrfe-gewrite gehyran. Nu hit eall ágán is on Ðæron oð ðine hand : Ðonne Ðu hit becweðe and sylle swá gesibre handa swá fremdre, swaÐer Ða leófre sy."

¹ Dom. B. i. 50, a (Tederleg); 59, b (Spersolt); 60, d (Ollantune).

² E. g., Amira, Nordg. Oblig., i. 401 ff.; ii. 331 ff.

only courts spoken of are the extraordinary and more important ones, a single *wapentake* being referred to only once, while all the other cases refer either to moots of double or treble hundreds and even to larger bodies. But even should we waive such a special pleading, which, after all, would only open the way to a possible solution, but not establish it as the only possible one, there remains the analogy with the Scandinavian customs which admit of publicity and legal confirmation in cases where the *thing* was not present.

Norwegian law empowered people to make valid transactions before a ship of at least thirteen benches of oarsmen. A very common substitute for a *thing* was a gathering at a banquet; in sparsely populated Iceland five men were deemed to be a "flock,"¹ and were empowered to witness transactions. Altogether the *fastar* and official witnesses acted as sufficient representatives of the neighborhood, and of the *thing* when this last was not present. In later law the *lysing* had to be gone through apart from, and often after the performance of the transfer itself. But at an earlier stage the *festermen* evidently acted as a substitute for the official ring of the moot, — a very useful contrivance at a time of bad roads and rare sittings of the popular courts.

When we collect all the features and assign its right value to the evidence of the Anglo-Scandinavian customary process supplied by the Medhamstead memoranda, hardly a doubt is left that the different customary practices observed in transferring land proceeded from very ancient roots. They are characterized in various degrees by three main traits: symbolic tradition on the part of the principal; proclamation of the validity of the transfer by sureties; and occasional confirmation of the proceedings by the popular court, the *gemót* or *thing*. And the foregoing observations, if accepted, can hardly fail to impress on the mind a sense of the close affinity between Old English and Scandinavian law. When both elements met, as they did in Northamptonshire, they reacted powerfully on each other just because they were based on very similar fundamental conceptions.

Paul Vinogradoff.

OXFORD.

¹ Gulathing's Lov, 71; cf. Amira, ii. 335.

CONSTRUCTIVE TRUSTS BASED UPON THE BREACH OF AN EXPRESS ORAL TRUST OF LAND.

Dedicated to Professor Langdell.

AN express trust may arise in any one of three ways:

1. The owner of property may undertake to hold it in trust for another.

2. The owner of property may transfer it to another, either in his lifetime or by will, to hold upon trust for a third person, or for the grantor himself if the conveyance is *inter vivos*.

3. A purchaser may procure the conveyance by the seller of the property purchased to a third person to hold upon trust either for the purchaser or for some other person.

If the trust is of land and oral, and the trustee, after undertaking the trust in good faith, declines to perform it, what are the legal relations of the trustee, the *cestui que trust*, and the creator of the trust?

In the face of the statute of frauds, which provides that in the absence of a writing the trust shall be "only void and of none effect," equity, it is clear, cannot compel the performance of the express trust. But does it follow from this that the trustee, who has broken his promise, is subject to no legal obligation whatever? In answering this question it will be helpful to consider separately each of the three classes of express trusts already described.

1. Declarations of trust by the owner.

The owner of land, who orally declares himself a trustee of it, may make this declaration gratuitously, or for value received. If the declaration of trust is gratuitous, and the trustee repudiates the trust, sheltering himself under the statute of frauds, that is the end of the matter. The express trust being invalid, the *cestui que trust* fails to make the expected gain, and the trustee does not suffer the anticipated loss. The old *status quo* being unchanged, there is no basis for any other claim against the trustee.

If, on the other hand, the declaration of trust is for money received or other consideration, the situation is different. In this case, as in the other, by force of the statute the *cestui que trust*

cannot get, and the trustee may keep, the land. But shall he be allowed to keep also the money or other consideration given to him by the *cestui que trust*? It is one thing for a promisor to save himself from a loss by reliance upon the statute, and quite another to make the statute a source of profit to himself at the expense of the promisee. Justice demands the restoration, so far as possible, of the *status quo* by compelling the trustee to surrender to the *cestui que trust* whatever he received from the latter upon the faith of his promise to perform the trust. Such relief does not in any way infringe upon the statute. The invalidity of the express trust is fully recognized. Indeed, it is the exercise of the trustee's right to use it as a defense that creates the *cestui que trust's* right of *restitutio in integrum*. This conclusion is abundantly supported by the decisions. One who has received money for an oral agreement to convey land, and refuses to convey, must refund the money.¹ If the consideration given for such an agreement was work and labor, that of course cannot be given back in specie, but the promisor must pay the value of such work and labor.² If the consideration was in the form of chattels, the promisor who breaks his promise, and also refuses to return the chattels, may be sued in trover or replevin,³ if he still has them, and in quasi-contract for their value or their proceeds, if he has consumed them or sold them.⁴ Similarly, if the oral agreement was for the exchange of lands, and one party having conveyed his, the other refuses to make the counter conveyance, the grantor may compel a reconveyance of his own land if the grantee still has it,⁵ and

¹ *Allen v. Booker*, 2 Stew. (Ala.) 21; *Barickman v. Kuykendall*, 6 Blackf. (Ind.) 21; *Hunt v. Sanders*, 1 A. K. Marsh. (Ky.) 556; *Jellison v. Jordan*, 68 Me. 373; *Cook v. Doggett*, 2 Allen (Mass.) 439; *Bacon v. Parker*, 137 Mass. 309, 311; *Payne v. Hackness*, 84 Minn. 195; *Perkins v. Niggerman*, 6 Mo. App. 546; *Gilbert v. Maynard*, 15 Johns. (N. Y.) 85; *Cade v. Davis*, 96 N. C. 139; *Rineer v. Collins*, 156 Pa. St. 342; *Bedell v. Tracy*, 65 Vt. 494; *Thomas v. Sowards*, 25 Wis. 631.

² *Grant v. Grant*, 63 Conn. 530; *Schoonover v. Vachon*, 121 Ind. 3; *Holbrook v. Clapp*, 165 Mass. 563; *Ham v. Goodrich*, 37 N. H. 185; *King v. Brown*, 2 Hill (N. Y.) 485; *Gifford v. Willard*, 55 Vt. 36; *Kessler's Estate*, 87 Wis. 660.

³ *Keath v. Patton*, 2 Stew. (Ala.) 38; *Updike v. Armstrong*, 4 Ill. 564; *Shreve v. Grimes*, 4 Litt. (Ky.) 220, 223; *Keith v. Patton*, 1 A. K. Marsh. (Ky.) 23; *Duncan v. Baird*, 8 Dane (Ky.) 101; *Luey v. Bundy*, 9 N. H. 298; *Rutan v. Hinchman*, 30 N. J. L. 255; *Orand v. Mason*, 1 Swan (Tenn.) 196; *Miller v. Jones*, 3 Head (Tenn.) 525.

⁴ *Sailors v. Gambril*, Smith (Ind.) 82. In some jurisdictions the remedy of quasi-contract is allowed, although the sale or destruction of the chattel is not established. *Booker v. Wolf*, 195 Ill. 365.

⁵ *Bürt v. Bowles*, 69 Ind. 1; *Jarboe v. Severin*, 85 Ind. 496; *Ramey v. Stone*, 23 Ky. L. Rep. 301; *Dickerson v. Mays*, 60 Miss. 388.

may recover the proceeds of the sale or its value if it has been sold.¹

2. Conveyances upon trust for the grantor or a third person, and devises upon trust for a third person.

If A conveys land to B upon an oral trust to hold for or reconvey to himself, the grantor, and B repudiates the trust which he assumed in good faith, the case is clearly within the principles which we have found to govern the first class of cases already considered. A cannot enforce performance of the express trust because of the statute of frauds. But B ought not to be allowed to retain A's land and thus by his breach of faith to enrich himself at the expense of A. If he will not perform the express trust, he should be made to reconvey the land to A, and to hold it until reconveyance as a constructive trustee for A. A, it is true, may by means of this constructive trust get the same relief that he would secure by the enforcement of the express trust. But this is a purely accidental coincidence. His bill is not for specific performance of the express trust, but for the restitution of the *status quo*. This right to *restitutio in integrum* has been enforced in several English cases.² There are a decision in Canada³ and a dictum in Missouri⁴ to the same effect. In Massachusetts the grantor is allowed to recover not the land but the value of the land in a count for land conveyed.⁵ But in several states the grantor is not allowed to recover either the land or its value.⁶ In many

¹ Wiley v. Bradley, 5 Ind. App. 272; Smith v. Hatch, 46 N. H. 146; Smith v. Smith, Winst. Eq. (N. C.) 30. In Bassford v. Pearson, 9 Allen (Mass.) 387, there is a dictum that *assumpsit* for money had and received cannot be maintained by the grantor for the proceeds of his land sold by the grantee. No reason is given for this dictum and it seems indefensible. In several cases the grantor was allowed to recover the value of his land from the grantee who still had it, but the question of the plaintiff's right to recover the land itself seems not to have been in the mind of either party. Bassett v. Bassett, 55 Me. 127; Miller v. Roberts, 169 Mass. 134; Nugent v. Teachout, 67 Mich. 571; Dikeman v. Arnold, 78 Mich. 455; Andrews v. Broughton, 78 Mo. App. 179; Henning v. Miller, 83 Hun (N. Y.) 403.

² Davies v. Otty, 35 Beav. 208; Haigh v. Kaye, L. R. 7 Ch. 469; Booth v. Turle, L. R. 16 Eq. 182; Marlborough v. Whitehead, [1894] 2 Ch. 133; De la Rochefoucauld v. Bonstead, [1897] 1 Ch. 196.

³ Clark v. Eby, 13 Grant Ch. (U. C.)

⁴ Peacock v. Peacock, 50 Mo. 256, 261.

⁵ Twomey v. Crowley, 137 Mass. 184; O'Grady v. O'Grady, 162 Mass. 290; Cromwell v. Norton, 79 N. E. Rep. 433 (Mass., 1906).

⁶ Mescall v. Tully, 91 Ind. 96; Calder v. Moran, 49 Mich. 14 (*semble*); Wolford v. Farnham, 44 Minn. 159; Marcel v. Marcel, 70 Neb. 498; Sturtevant v. Sturtevant, 20 N. Y. 39.

others, also, the courts, while properly refusing to enforce the express trust, give no intimation of any right to recover the land on any theory of restitution, or its value on the principle of quasi-contract.¹

The Massachusetts rule permitting the grantor to recover the value of the land instead of the land itself is illogical. It is based upon the principle of restitution. But this principle requires restitution *in specie* whenever it is practicable, and restitution in value only as a substitute when specific restitution is impossible. The Massachusetts rule, too, is inferior to the English rule in point of justice. If the grantee, when he repudiates his oral obligation, is insolvent, the grantor in Massachusetts must come in with the general creditors and get only a dividend on the value of the land, whereas in England he would recover the land itself. The statute of limitations would bar the money claim much sooner than the claim for the land. If, again, after the repudiation of the express oral trust, the land should appreciate greatly in value, the repudiator would, in Massachusetts, reap the benefit of this appreciation, while in justice it should go to the grantor.²

But restitution in value is certainly an approximation to full justice, and in many cases the grantee would be as well satisfied with the value of the land as with the land itself. But there is nothing to be said in defense of the prevailing American doctrine which gives the grantor neither the land nor its value. This doctrine is due to the failure of the court to perceive that specific performance of an express agreement and compulsory restitution of the consideration for the agreement are fundamentally different things, even in cases in which the practical result of the two remedies is the same.³ This oversight of the American courts is the

¹ Patton v. Beecher, 62 Ala. 579; Brock v. Brock, 90 Ala. 86; Jacoby v. Funkhouser, 40 So. Rep. 291 (Ala., 1906); McDonald v. Hooker, 57 Ark. 632; Barr v. O'Donnell, 76 Cal. 469; Sheehan v. Sullivan, 126 Cal. 189; Verzier v. Conrad, 75 Conn. 1; Stevenson v. Crapnell, 114 Ill. 19; Moore v. Horsley, 156 Ill. 36; Fouty v. Fouty, 34 Ind. 433; Gowdy v. Gordon, 122 Ind. 533; Ostenson v. Severson, 126 Ia. 197; Gee v. Thrailkill, 45 Kan. 173; Wentworth v. Skibles, 89 Me. 167; Moore v. Jordan, 65 Miss. 229; Conner v. Follansbee, 59 N. H. 124; Hogan v. Jaques, 19 N. J. Eq. 123; Lovett v. Taylor, 54 N. J. Eq. 311 (criticizing the English cases); Boreham v. Craig, 80 N. C. 224; Barry v. Hill, 166 Pa. St. 344; Taft v. Dimond, 16 R. I. 584; Kinsey v. Bennett, 37 S. C. 319; Parry v. American Co., 56 Wis. 221.

² It is assumed that the value of the land at the time of the repudiation of the express trust would be the amount payable by the grantee. But there seems to be no decision on this point.

³ Some of the American decisions were influenced by a hasty and now overruled

more surprising, because in another class of cases, not to be distinguished in principle from those under consideration, the same courts, unwilling to permit the grantee to profit by his breach of faith at the expense of the grantor, have rightly given to the grantor, by way of restitution, the same practical relief which specific performance would have given him if that could have been enforced. This other class of cases is commonly said to illustrate the rule that oral evidence is admissible to show that an absolute conveyance was intended to operate as a mortgage. This, of course, is a loose way of stating the principle. In truth, equity cannot compel specific performance of the oral agreement to reconvey, because the statute of frauds forbids. But, if the grantor pays or tenders the amount due to the grantee, it would be shockingly unjust for the grantee to keep the land. Equity therefore says to the grantee, "We cannot compel you to perform your promise to reconvey, but if you will not keep your word, surrender to the grantor what you received from him on the faith of your promise." Obviously this reasoning, which justifies the result in the mortgage cases, is equally cogent in the cases in which A conveys to B upon an oral trust to reconvey, and in England both classes of cases are dealt with as resting upon the same principle of *restitutio in integrum*.

If A conveys land to B upon an oral trust for C, and B refuses to perform the trust, the rights of the parties are easily defined. C obviously cannot enforce the express trust,¹ nor, since he has

judgment of Leach, V. C., in *Leman v. Whitley*, 4 Russ. 423. In that case the really gratuitous conveyance upon the oral trust for the grantor purported to be in consideration of £400. The vice-chancellor, having committed the error of refusing relief by way of restitution, was so much impressed by the resulting injustice that he gave the grantor a vendor's lien for the ostensible purchase money, and thereby fell into another error. This error was repeated in *Gallagher v. Mars*, 50 Cal. 23; *McCoy v. McCoy*, 32 Ind. App. 38. But this extension of the vendor's lien to cover a case in which no money was payable has been generally repudiated. *Stevenson v. Crapnell*, 114 Ill. 19; *Ostenson v. Severson*, 126 Ia. 197; *Palmer v. Stanley*, 41 Mich. 218; *Tatge v. Tatge*, 34 Minn. 272.

¹ *Skett v. Whitmore*, Freem. Ch. (Miss.) 280; *Jacoby v. Funkhouser*, 40 So. Rep. 291 (Ala., 1906); *Ammonette v. Black*, 73 Ark. 310; *Smith v. Mason*, 122 Cal. 426; *Robson v. Hamell*, 6 Ga. 589; *Lantry v. Lantry*, 51 Ill. 458; *Marie Church v. Trinity Church*, 205 Ill. 601; *Meredith v. Meredith*, 150 Ind. 299; *Willis v. Robertson*, 121 Ia. 380; *Rogers v. Richards*, 67 Kan. 706; *Philbrook v. Delano*, 29 Me. 410; *Campbell v. Brown*, 129 Mass. 23; *Perkins v. Perkins*, 181 Ill. 401; *Shaffer v. Huntington*, 53 Mich. 310; *Luse v. Reed*, 63 Minn. 5; *Metcalf v. Brandon*, 58 Miss. 841; *Taylor v. Sayles*, 57 N. H. 465; *McVay v. McVay*, 43 N. J. Eq. 47; *Goldsmith v. Goldsmith*, 145 N. Y. 313, 318 (but see *Ahrens v. Jones*, 169 N. Y. 555); *Salter v. Bird*, 103 Pa. St. 436; *Perkins v. Cheairs*, 58 Tenn. 194.

parted with nothing, can he have relief upon any other ground. But A, as in the preceding case, may recover his land,¹ for B may not honestly keep it if he will not fulfill the promise which induced A to part with it. In Massachusetts A would probably recover the value of the land instead of the land itself.²

One would expect a devise by A to B upon an oral trust for C to create the same rights upon B's refusal to perform the trust as a conveyance by A to B upon an oral trust for C, except that, restitution to the testator being impossible, his heir, as representing him, would be entitled to the reconveyance of the land. But by a strange inconsistency in the law both in England and in this country, C is allowed to get the benefit of the trust in spite of the statute of frauds.³ These decisions were induced by the desire to prevent the use of the statute as an instrument of fraud. But the courts seem to have lost sight of the distinction between a misfeasance and a non-feasance, between a tort and a passive breach of contract. If a devisee fraudulently induces the devise to himself, intending to keep the property in disregard of his promise to the testator to convey it or hold it for the benefit of a third person, and then refuses to recognize the claims of the third person, he is guilty of a tort, and equity may and does compel the devisee to make specific reparation for the tort by a conveyance to the intended beneficiary.⁴ If, on the other hand, the devisee has acquired the property with the intention of fulfilling his promise, but afterwards decides to break it, relying on the statute as a defense, he commits no tort, but a purely passive breach of contract. Equity should not compel the performance of this contract at the suit of the beneficiary, because the statute forbids. But, notwithstanding this

¹ Hal v. Linn, 8 Colo. 264; Von Trotha v. Bamberger, 15 Colo. 1 (*semble*); McKinney v. Burns, 31 Ga. 295; Peacock v. Peacock, 50 Mo. 256, 261.

But see, *contra*, Irwin v. Ivers, 7 Ind. 308; Calder v. Moran, 49 Mich. 14 (*semble*).

² Basford v. Pearson, 9 Allen (Mass.) 387 (discrediting Griswold v. Messenger, 6 Pick. (Mass.) 517); Twomey v. Crowley, 137 Mass. 184.

³ Sellach v. Harris, 2 Eq. Cas. Abr. 46, pl. 11; Norris v. Fraser, 15 Eq. Rep. 318; De Laureheel v. De Boom, 48 Cal. 581; Buckingham v. Clark, 61 Conn. 204; Larmon v. Knight, 140 Ill. 232; Ramsdel v. Moore, 153 Ind. 393; Gilpatrick v. Glidden, 81 Me. 137; Gaither v. Gaither, 3 Md. Ch. 158; Campbell v. Brown, 129 Mass. 23, 26; Hooker v. Axford, 33 Mich. 453; Ragsdale v. Ragsdale, 68 Miss. 92; Smullin v. Wharton, 103 N. W. Rep. 288 (Neb., 1905); Carver v. Todd, 48 N. J. Eq. 102; Norton v. Mallory, 63 N. Y. 434; Collins v. Barton, 20 Oh. 492; McAuley's Estate, 184 Pa. St. 124; Rutledge v. Smith, 1 McCord Eq. (S. C.) 119; McLellan v. McLean, 2 Head (Tenn.) 684.

But see, *contra*, Moore v. Campbell, 102 Ala. 445; Orth v. Orth, 145 Ind. 184.

⁴ Crossman v. Keister, 79 N. E. Rep. 58 (Ill., 1906); Newis v. Topfer, 121 Ia. 439; Wall v. Hickly, 112 Mass. 171; Pollard v. McKenney, 69 Neb. 742.

honest acquisition of the land, the devisee cannot honestly retain it, and equity should compel him to surrender it to the heir as the representative of the testator. It is quite possible that the courts, in giving C the benefit of the trust in cases of devises by A to B upon an oral trust for C, and in refusing him any relief in cases of similar conveyances *inter vivos*, were influenced by the practical consideration that in the latter case the grantor, recovering his property by the principle of restitution, would still be in a position to accomplish his purpose, whereas in the case of the devise the accomplishment of his purpose would depend wholly upon the will of his heir. This view finds confirmation in a recent New York case,¹ in which the grantee in a conveyance executed by one upon his deathbed agreed orally to deal with the property for the benefit of a third person, and was compelled by the court to carry out his promise.

3. Conveyances by the seller, by direction of the buyer, to a third person.

In the old days of uses, when the title to the bulk of the land in England was not in the owners but in feoffees to the use of the owners, it was natural to presume, as the courts did presume, that one who received a conveyance from a seller by the direction of the buyer was to hold in trust for the buyer. But after the extirpation of uses by the Statute of Uses in 1536, the custom of the country changed, nor did it revive with the introduction, a century later, of the modern passive trust. Accordingly, after the Statute of Uses there was no reason for any presumption that the grantee of a seller was a trustee for the one who paid the purchase money. But the courts, nevertheless, continued to raise the presumption, and furthermore treated this presumption of fact, based upon the supposed intention of the parties, as if it were a rule of law, so that these presumed trusts arising from the payment of the purchase money were deemed to be trusts by operation of law and therefore within the exception to the statute of frauds. This doctrine was criticized by Chancellor Kent in *Boyd v. McLean*,² and in several states has been modified by legislation. The statutes, however, differ in form and effect.

In Indiana and Kansas the statute abolishes the presumption of a trust resulting from the mere fact that one person pays the purchase money for a conveyance to another, but provides expressly

¹ *Ahrens v. Jones*, 169 N. Y. 555.

² 1 Johns. (N. Y.) 582, 585.

that whenever the trustee actually agrees, although only by word of mouth, to hold in trust for the buyer, the trust is valid.¹

In Kentucky the statute abolishes not only the presumption of a trust, but the trust itself, providing, however, that the grantee, who refuses to perform the oral trust, shall reimburse the buyer for the purchase money paid by him to the seller.²

In Michigan and Minnesota the statute abolishes the trust and gives the buyer no relief of any kind against the grantee, thereby working a forfeiture upon the confiding buyer to the unmerited profit of the faithless grantee.³

The language of the New York statute is almost identical with that of the Michigan and Minnesota statutes, but the courts are not agreed as to its effect. In some cases the statute has been interpreted, in accordance with the Michigan and Minnesota decisions, as penalizing the buyer to the advantage of the grantee.⁴ In others the courts have declared that the statute has merely abolished the presumption of a resulting trust, and does not prevent the creation of a valid trust, if there was in fact an agreement, although not in writing, that the grantee was to be a trustee for the buyer.⁵ This interpretation, it will be seen, gives to the New York statute the same effect which is secured in express terms by the Indiana and Kansas statutes.

Of these three statutory doctrines it may be said that the Michigan and Minnesota rule is shockingly unjust in enriching the faithless grantee at the expense of the trusting buyer; that the Kentucky

¹ *Glidewell v. Spaugb*, 26 Ind. 319; *Franklin v. Colley*, 10 Kan. 260.

² *Martin v. Martin*, 5 Bush (Ky.) 47, 56; *Manners v. Bradbury*, 81 Ky. 153, 157.

³ *Groesbeck v. Seeley*, 13 Mich. 329; *Newton v. Sly*, 15 Mich. 391; *Winans v. Winans*, 99 Mich. 74; *Chapman v. Chapman*, 114 Mich. 144; *Irvine v. Marshall*, 7 Minn. 286; *Johnson v. Johnson*, 16 Minn. 512; *Haaven v. Hoaas*, 60 Minn. 313; *Anderson v. Anderson*, 81 Minn. 329; *Ryan v. Williams*, 92 Minn. 506.

⁴ *Hurst v. Harper*, 14 Hun (N. Y.) 280; *Stebbins v. Morris*, 23 Blatchf. (U. S.) 181; *Siemon v. Schurck*, 29 N. Y. 598, 611.

⁵ *Gage v. Gage*, 83 Hun (N. Y.) 362; *Smith v. Balcom*, 24 N. Y. App. Div. 437 (*semble*); *Jeremiah v. Pitcher*, 26 N. Y. App. Div. 402; *aff.* 163 N. Y. 574.

In New York, if the grantee takes the title, agreeing orally with the buyer to hold it in trust for a third person, the latter may enforce the trust. *Siemon v. Schurck*, 29 N. Y. 598; *Gilbert v. Gilbert*, 2 Abb. App. (N. Y.) 256; *McCahill v. McCahill*, 11 N. Y. Misc. 258. This result seems as unwarranted by the statute as it is by the decisions prior to the statute. In Michigan and Minnesota the third person gets, in such a case, no rights. *Shafter v. Huntington*, 53 Mich. 310; *Connelly v. Sheridan*, 41 Minn. 18. Upon the sound principle of *restitutio in integrum*, it is submitted, the grantee should be charged as a constructive trustee for the buyer. See *Randall v. Constans*, 33 Minn. 329, 336-338.

rule is a close approximation to justice; and that the Indiana and Kansas rule does complete justice. This rule also makes for consistency in the law; for it is everywhere agreed that if the grantee takes the conveyance as a security for a debt due from the buyer, however small the debt or however valuable the land, he cannot, although he repudiates his agreement to reconvey upon payment of the debt, keep the land after payment or tender by the buyer. On the other hand, in Michigan and Minnesota, and possibly in New York, the gratuitous grantee who breaks faith with the buyer may keep the land, while the equally faithless grantee who took the title as security and who is paid off must surrender the land.

It is a step forward, even if a short step, to abolish the artificial presumption of a resulting trust because of the mere payment of the purchase money, for such a presumption favors the buyer unduly. But it is a long step backward to declare that the statute penalizes the innocent buyer to the aggrandizement of the unconscionable grantee. Nor is such a declaration called for by the language of the statute. The provision that there shall be no resulting trust in favor of the purchaser against the grantee, means simply that the law shall not enforce the trust based upon the presumed intention of the parties, — that is, a trust implied in fact, which would arise, if at all, at the time of the payment of the purchase money. But the constructive trust created to prevent the dishonest enrichment of the grantee at the expense of the buyer is enforced in defiance of the grantee's intention, arises only after the grantee has repudiated the intended trust, and is protected by another provision of the statute excepting trusts arising by operation of law from the prohibition of the statute.

It is to be hoped, therefore, that the later New York decisions on this point may prevail over the earlier ones. It is greatly to be wished, also, that the simple principle which requires every one, who is unassailable because of the statute of frauds for the breach of his express trust or promise, to make restitution, *in specie* if practicable, otherwise in value, of whatever he has received upon the faith of his oral undertaking, might receive widespread recognition and appreciation. Such recognition and appreciation would have helped greatly in simplifying the law and promoting justice in the three classes of trusts under consideration in this article.

James Barr Ames.

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CONTRACTS TO PERFORM TO THE SATISFACTION OF THE OTHER PARTY IN ANOTHER STATE. — A contract to furnish goods to the satisfaction of the other party is, by the general rule, undischarged so long as that party is honestly dissatisfied with them.¹ In New York and a few other states, however, performance to the satisfaction of a jury discharges such a contract, unless involving matters of taste.² Whether the New York rule is one of construction or of positive law is not wholly clear. There is talk in several cases³ of a genuine search after the parties' intention, and no actual holding is irreconcilable with it. But positive rules couched in terms of construction are not unknown to the law. A layman would not easily be persuaded that "to my satisfaction" really bears a double meaning. In the absence of such a phrase the law would require performance to the satisfaction of a jury anyhow. Moreover, the rule undeniably first took shape as one in defiance of intention.⁴ "That which the law shall say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with,"⁵ — is an early judicial formula, much quoted.

Assuming, then, that this is a rule of the positive law of contract, it may be further analyzed. Does it operate upon the creation of contract, or is it concerned alone with performance? Does New York raise an obligation different from that expressed, and bind the promisor only to satisfy either his promisee or a jury, or does New York create an obligation precisely as stipulated, and permit it afterwards to be discharged in a different way?

¹ *Inman Mfg. Co. v. American Cereal Co.*, 124 Ia. 737.

² *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387. See Wald's *Pollock*, *Contracts*, 3 ed., § 51 n. See also 9 Cyc. 618, 620.

³ See *Doll v. Noble*, 116 N. Y. 230; *Russell v. Allerton*, 103 N. Y. 288; *Hummel v. Stern*, 21 N. Y. App. Div. 544; aff. 164 N. Y. 603. Cf. *Nolan v. Whitney*, 88 N. Y. 648.

⁴ *Folliard v. Wallace*, 2 Johns. (N. Y.) 395.

⁵ *City of Brooklyn v. Brooklyn City Ry.*, 47 N. Y. 475, 479.

Under a territorial law it seems fundamental that the creation of a contractual obligation, its validity and magnitude, depends upon the law of the place of making.⁶ Once created, its performance is governed by the law of the place of performance, which alone can raise a cause of action for breach, and which (within constitutional limits) may, therefore, alter its performance.⁶ An agreement to perform to the promisee's satisfaction, made in a jurisdiction where the usual rule prevails, creates, then, an obligation to satisfy the promisee, no matter where performable; but if performance be in New York, performance there to a jury's satisfaction doubtless discharges the obligation.⁷ As to foreign obligations the New York rule is one of performance. But as to those of domestic origin, may not New York refuse to create at home what she condemns from abroad? Does she waste her energy in creating obligations which she shall inevitably modify in the performance? Does she not rather bring them forth just as they shall be performed? Were the law in the habit of writing bargains for persons *sui juris*, this argument would have weight. But when policy requires it to interfere with freedom of contract, the law does not mold over the bargain that offends it, but inexorably strikes it down. It is unscientific to conceive of the law as incorporating into the obligations it raises all the defenses which upon various contingencies it may provide.

That such an analysis may be of vital importance, appears from the facts of a recent Iowa case. The plaintiff by his New York agent agreed in writing in Illinois to install machinery in Iowa to the full satisfaction of the defendant. By Iowa law he would be required to satisfy his promisee; by Illinois law⁸ a jury only. In an action for the price the plaintiff offered evidence that the language of the agreement meant "performance which ought to satisfy," and that the defendant had reasonable cause so to understand it. This the court ruled out as violating the parol evidence rule. *Inman Mfg. Co. v. American Cereal Co.*, 110 N. W. Rep. 287. Parties normally use language in the sense with which they are familiar, *i. e.*, that of their domicile. They cannot be presumed to mean it in the sense attached thereto in whatever part of the world their contract happens to be performable. To use the parol evidence rule as a means of saddling on the parties the local meaning of the place of performance or of the forum, seems a blind perversion.⁹ If this be true matter of interpretation, the court should have heard the evidence. If, again, it be matter of positive Illinois law of the creation of contract, the evidence was equally admissible. When the law of the place of making raises an obligation different from that expressed by the parties, a foreign forum must ascertain its precise extent. But if, as seems sounder, this be matter of performance only; if Illinois raise the obligation just as the parties express it, her collateral rule modifying performance has obviously no application to performance in another state. Having taken the obligation as Illinois created it, it is for Iowa to say whether a different performance shall satisfy it. Iowa says it shall not; the evidence was therefore irrelevant. Under the Illinois doctrine that the creation of contractual obligations is governed by the law of the place of performance, this result would equally follow.¹⁰

⁶ See 16 HARV. L. REV. 58; 17 *ibid.* 568; *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262.

⁷ *Russell v. Allerton*, *supra*.

⁸ *Keeler v. Clifford*, 165 Ill. 544.

⁹ See 4 Wig., Ev., § 2463.

¹⁰ *Abt v. Am. Trust & Savings Bank*, 159 Ill. 467.

EXECUTION OF POWERS IN EQUITY. — When a donee of a power purports to appoint, and the appointment is invalid at law on account of a defect in form, equity anomalously gives it full effect at the suit of two classes of appointees: first, those who gave value, including creditors;¹ and secondly, those whose position is said to constitute a meritorious consideration, limited roughly to charities,² wives,³ and children.⁴ Further, when a donee with present power to appoint binds himself by a valid legal contract for valuable consideration to exercise his power, but dies without so doing, the contract is held a good execution of the power in equity;⁵ not, surely, on the theory of specific performance, for the defendant is the remainderman, who is not in privity with the covenantor. Rather, then, is this a second kind of defective execution.⁶ This conclusion coincides with two decisions that covenants running to the second class of appointees — wives⁷ and children⁸ — are also good appointments in equity, though unsupported by that valuable consideration required as a basis for specific performance. Though equity, therefore, will help out these two sorts of defective execution in favor of both classes mentioned, no aid will be given where there is a mere declaration of intent⁹ by the donee, or when the donee's agreement to appoint is unenforceable at law, though it be for value.¹⁰

The conclusion reached above will be of aid in solving the question as to the effectiveness of a covenant to appoint in respect to the time of its execution. If the covenant is to be enforced against the remainderman as a defective execution of the power, then it cannot be effectual unless a formally correct appointment made at the same time would have been valid. Now, with reference to the time when a power may be exercised, powers not presently absolute fall into two divisions. The first consists of powers the effectiveness of an exercise of which depends on the happening of some contingency. Here no reason appears why an appointment made at any time, though before the contingency happens, should not be good on the happening of the event specified. The second division comprises those cases where the donor imposes a limitation, not on the circumstances under which an execution of a power will be effectual and the appointee take his appointed estate, but on the conditions under which alone the donee may exercise his discretion and make an appointment. In the former division the donor restricts the estates over which the donee's disposition will be effectual; in the latter he also circumscribes the discretion of the donee in appointing those estates. Here, therefore, a premature appointment is ineffectual. In deciding into which of these divisions, determined as they are by the intent of the donor, a specific case falls, it must be noted that more weight is to be given the nature of the condition than the mere chance of wording. Though the dividing line is thus one fixed by questions of fact, yet its existence is clearly established by authority.¹¹ In the first division

¹ *Wilkes v. Holmes*, 9 Mod. 485.

² *Innes v. Sayer*, 7 Hare 377.

³ *Tollet v. Tollet*, 2 P. Wms. 489.

⁴ *Smith v. Ashton*, 1 Ch. Cas. 263.

⁵ *Coventry v. Coventry*, 1 Str. 596; *In re Dykes*, L. R. 7 Eq. 337.

⁶ See *Shannon v. Bradstreet*, 1 Sch. & Lef. 52, 63.

⁷ *Fothergill v. Fothergill*, 1 Eq. Cas. Abr. 222, pl. 9.

⁸ *Sarth v. Blanfrey*, Gilb. 166.

⁹ *Piggott v. Penrice*, Prec. Ch. 471.

¹⁰ *Blore v. Sutton*, 3 Meriv. 237.

¹¹ See *Machir v. Funk*, 90 Va. 284, 289. *Contra*, *Johnson v. Touchet*, 37 L. J. Ch. (N. S.) 25.

are cases where the contingency is the donee's surviving some one,¹² or coming into possession of a life estate;¹³ in the second, cases where powers are given executors to sell on the termination of a life estate,¹⁴ and cases of testamentary powers.¹⁵

Accordingly, in the case of covenants, we find that those made before the specified event are, in the first class of cases, good executions in equity,¹⁶ and in the second, invalid.¹⁷ The former are instanced by a series of cases where successive life estates were created with a power to any tenant in possession to appoint by way of jointure, and covenants to appoint made by life tenants before their subsequent coming into possession were held to be good equitable appointments, on the ground that the requirement that the life tenant be in possession affected only the arising of the appointee's interest, and was not a prescription of the time in which the donee was to make the appointment.¹⁸ This same result was recently attained in a more extreme English case, where the power was created by the donor in his will, and the covenant was made before the donor's death, though after the execution of the will. *Charlton v. Charlton*, [1906] 2 Ch. 523. The case would of course have been correct had the covenant been made after the testator's death, but the present decision, though convenient and desirable, is difficult to support, for it is hard to see how a power can be exercised before it is created. It may, however, be followed on the reasoning that the operation of the covenant, the defective appointment, is suspended until the power is created, and that it then acts as an execution of the power from that time,¹⁹ as a will passes after-acquired property.²⁰

EFFECT OF BEQUESTS AND DEVISES TO A CORPORATION IN EXCESS OF CHARTER LIMITATIONS. — At common law a corporation has the implied power to acquire, by either purchase or devise, realty and personalty for the purposes of its business. Often the state, however, for reasons of public policy imposes by law express limitations either in amount or in kind. In almost every state except Pennsylvania the usual limitation against "holding" interdicted property is construed as including a limitation against "taking" such property.¹ Whether we construe this latter limitation as preventing the implication of a grant of full power to take property, or as merely inhibiting the use of that power, the determination of the rights of a corporation in personalty bequeathed to it in excess of charter limitations must be the same. On the death of a testator, his personal property passes to his personal representative for administration. If the corporation is seeking to get the bequest from him, the court should not aid it in abusing its powers and *a fortiori*

¹² *Sutherland v. Northmore*, 1 Dick. 56; *Dalby v. Pullen*, 2 Bing. 144.

¹³ *Cf. Allford v. Allford*, *infra*.

¹⁴ *Sweigert v. Berk's Adm.*, 8 Serg. & R. (Pa.) 299; *Booraem v. Wells*, 19 N. J. Eq. 87; *Carlyon v. Truscott*, L. R. 20 Eq. 348.

¹⁵ *Reid v. Shergold*, 10 Ves. Jr. 370. See *In re Parkin*, [1892] 3 Ch. 510, 517.

¹⁶ *In re Lambert's Estate*, [1901] 1 Ir. Ch. D. 261.

¹⁷ *Thacker v. Key*, L. R. 8 Eq. 408.

¹⁸ *Allford v. Allford*, Gilb. 167; *Jackson v. Jackson*, 4 Bro. Ch. *462; *Affleck v. Affleck*, 3 Smale & G. 394.

¹⁹ *Cf. In re Anstis*, 31 Ch. D. 596.

²⁰ *Cf. Holroyd v. Marshall*, 10 H. L. Cas. 191.

¹ *Wood v. Hammond*, 16 R. I. 98; *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313.

in asserting power to take if it does not possess it.² Should the executor hand over the property which the corporation could not otherwise obtain, such payment would obviously be wrongful, and if the executor were irresponsible, the corporation should be forced to repay.³ The effect, however, of a subsequent act of the legislature enlarging the kind or amount of property which the corporation may hold, should vary according as we construe the limitation to be a denial of full power or a prohibition against the use of power. In the former case the act cannot divest the rights of the next of kin; in the latter, it removes the objection to the described legatee's taking, and the corporation should be allowed to receive the legacy.⁴

In the case of devises the construction of the limitation is all-important. Title to real estate vests in the heir and devisee *eo instante* with the death of the testator. If we say the corporation has no capacity to take title, the devise must vest in the heir on the death of the testator, and no subsequent act of the legislature can deprive him of this property without compensation. This construction of "lack of power" has been adopted in some states.⁵ Their statutory policy, which is particularly harsh to devises to corporations, might justify that interpretation. But the better construction would seem to be a mere prohibition against the use of power. It is settled that in the case of a grant of land in excess of charter limitations neither the grantor nor his heirs can upset the conveyance; that the grantees of the grantee corporation get a good title; and that the latter even has a marketable title for purposes of specific performance.⁶ The suggestion that the corporation may be a conduit of title without actually having it and that the *status quo* between the grantor and the corporation grantee is not disturbed solely for reasons based on some idea of estoppel, is not borne out by the cases. They are practically unanimous in saying that title passes to the corporation and that the state only can object in a direct proceeding to declare the charter forfeited.⁷ No real distinction is seen in this respect between a grant and a devise. Both are executed; both need the operation of law for their effect. Moreover, the analogy of the English mortmain laws sustains this interpretation. Under these acts title passed to the corporation, whether by grant or devise, subject to being forfeited by the overlord on office found.⁸ Though these laws do not obtain in the United States save in Pennsylvania,⁹ yet the same policy against the accumulation of property by the "dead hand" which dictated them, underlies in large part the statutory limitations under discussion. Hence, under the latter title should pass to the corporation, and any subsequent act of the legislature enlarging the amount of property the corporation might hold, should operate as a waiver of the state's right to declare the charter forfeited.¹⁰ And such was the holding of a recent Massachusetts case. *Hubbard v. Worcester Art Museum*, 80 N. E. Rep. 490.

² *Trustees of Davidson College v. Chambers' Executors*, 3 Jones Eq. (N. C.) 253, 273. Cf. *Case v. Kelly*, 133 U. S. 21.

³ See *Orr v. Kaines*, 2 Ves. 194.

⁴ *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Jones v. Habersham*, 3 Woods (U. S.) 443, 475; aff. 107 U. S. 174.

⁵ *Matter of McGraw*, 111 N. Y. 66; *The House of Mercy v. Davidson*, 90 Tex. 529.

⁶ *Alexander v. Tolleston Club*, 110 Ill. 65; *Shewalter v. Pimer*, 55 Mo. 218; *Lancaster v. Amsterdam Improvement Co.*, 140 N. Y. 576, 586.

⁷ *Cooney v. Booth Packing Co.*, 169 Ill. 370; *Hickory Farm Oil Co. v. R. R.*, 32 Fed. Rep. 22.

⁸ Shelford, *Law of Mortmain*, 1-21.

⁹ *Cook, Corp.*, 4 ed., § 694.

¹⁰ *Farrington v. Putnam*, 90 Me. 405; *Hanson v. Little Sisters of the Poor*, 79 Md. 434. See *Cromie's Heirs v. Institution of Mercy*, 3 Bush (Ky.) 365.

CLAIM IN RESPECT OF A POSSESSORY TITLE TO LAND RESUMED BY THE CROWN. — The English Privy Council recently decided that one who had had adverse possession of land for ten years acquired such an interest that, when the crown resumed the land as if by eminent domain, his executors, as soon as the period of limitation had run after his entry, might require the land to be valued with a view to compensation. *Perry v. Clissold*, [1907] A. C. 73. Since the original owner was by that time surely barred under the English rule allowing adverse possession to be tacked even between successive disseisors,¹ and since the valuation was to be of the whole fee as of the time of resumption, there is an inference — supported by another case² — that the executors would recover the whole value. On the one hand, this case does not purport to require compensation for a right in the land acquired — if such a thing be possible — after the state's title accrued. Such reasoning would oppose the general rule that a subsequent grantee³ or heir⁴ of one whose land is taken acquires no right to compensation, which is a personal claim. And by way of analogy, a claimant of government land who has no adverse possession, but merely an expectation of staying on the land to obtain a grant of title, is recompensed only according to the probability of the fulfilment of his expectation.⁵ On the other hand, the court found in the resumption act under which the land was taken no authority given to the crown to enter under the absent owner in such a way as to disturb, as the owner could, any present vested right of the trespasser. This accords with the idea that the title taken by the state is not one of privity.⁶ Since, then, the adverse possessor acquired no new right in the land after it was taken, and since the crown did not take under the former owner, the question is, what is the vested right of an adverse possessor?

Two series of articles,⁷ relied on by the court in defining this right, point out that originally at common law possession was protected against ownership. Then very early a disseisee was given a right to enter or gain back possession from his disseisor. This right was a mere chose in action, at first absolutely non-transferable and good only against the disseisor himself. It was founded simply on former possession and ouster. But the possession of the disseisor — the tangible thing — was the property, — transferable, inheritable, devisable, giving dower and curtesy, subject to execution and escheat. Possession with no outstanding rights to take it away made a complete ownership. The right to get back possession is now generally transferable and follows the land against most possessors. It is so extensive that today a possessor who is free from such a right outstanding against him is commonly thought to have in himself, in addition to his possession, a valuable abstract right called title. This change in point of view, this turning of the absence of outstanding rights into the presence of an affirmative title, should not, logically, change the nature of the right of possession when the possessor is dealing with strangers to outstanding rights. As against all who have no outstanding rights, the possessor should have

¹ See *Willis v. Earl Howe*, [1893] 2 Ch. 545.

² See *In re Harris*, [1901] 1 Ch. 931.

³ *Patten v. Fitz*, 138 Mass. 456.

⁴ *Moore v. City of Boston*, 8 Cush. (Mass.) 274.

⁵ *Elsworth, etc., Ry. Co. v. Gates*, 41 Kan. 574. But see *Spokane, etc., Ry. Co. v. Ziegler*, 167 U. S. 65.

⁶ See *Emery v. Boston Terminal Co.*, 178 Mass. 172.

⁷ Prof. Maitland in 1 L. Quar. Rev. 324; 2 *ibid.* 481; 4 *ibid.* 24, 286; Prof. Ames in 3 HARV. L. REV. 23, 313, 337.

the ownership. This proprietary character of possession appears today in cases allowing an adverse possessor to maintain ejectment—a proprietary action—against any one not claiming under the outstanding title.⁸ It is further supported by a few cases like the present. The adverse possessor whose land is taken loses, as between himself and the state, not the mere expectancy of a property right, but one already in existence, for which logically he should have full recompense at once.⁹ Practically, however, to protect the state and the outstanding right of the former owner, it is better to have the money paid into court, the income and eventually the principal² to be paid to the adverse possessor unless the original owner appears before he is barred.¹⁰ It is immaterial how long the adverse possession has lasted,¹¹ or whether it began in a wrongful entry,² but it must be more than the possession of a tenant, even though the landlord does not appear.¹²

EQUITABLE ESTOPPEL OF MUNICIPAL CORPORATIONS. — Cases occasionally arise the peculiar hardship of which pleads for a doctrine of equitable estoppel against municipal corporations which are asserting a right or setting up a defense based on the ground that they have acted *ultra vires*. The general rule, however, is well settled that, while a municipal corporation can be estopped from asserting an irregular exercise of corporate power, it cannot be estopped from asserting a lack of power. The reason for allowing the privilege is hardly because, as is sometimes said, the corporation is but a trustee for the inhabitants, for acquiescence by the latter in the *ultra vires* act will not estop them,¹ though acquiescence in a trustee's breach of trust estops a *cestui*. Nor can the suggestion² that the corporation is the agent of the inhabitants, binding them by wrongful acts within its powers but not by acts wholly beyond its powers, be pressed far; for the inhabitants can never ratify, as can an ordinary principal, an act done wholly in excess of authority.³ Rather, the reason is the strong public policy of restraining these corporate powers strictly within their grant. This is founded on the vital consideration of the necessity of saving municipalities from fraud and ruin, induced by the misconduct of corrupt officials.

Several classes of cases, however, which seem exceptions, must be carefully distinguished. Often it is not clear whether the corporation has exceeded its powers or only abused them. This is frequently the case with municipal bonds. But where the decisions seem contrary to the general rule it will usually appear that some sort of power to issue can be found, in which case irregularities in its exercise cannot be urged against a holder for value.⁴ Also, while a municipality may not be liable on a contract *ultra vires* as framed, yet, if it has accepted benefits under the contract which are

⁸ *Asher v. Whitlock*, L. R. 1 Q. B. 1. *Contra*, *Doe d. Carter v. Barnard*, 13 Q. B. 945.

⁹ See *Andrew v. Nantasket Beach Ry. Co.*, 152 Mass. 506.

¹⁰ *In re Loder*, 19 N. S. W. Eq. 41.

¹¹ See *Geyde v. Commissioner of Public Works*, [1891] 2 Ch. 630.

¹² *Geyde v. Commissioner of Public Works*, *supra*.

¹ *Ottawa v. Carey*, 108 U. S. 110; *McPherson v. Foster Bros.*, 43 Ia. 48.

² See *Schumm v. Seymour*, 24 N. J. Eq. 143, 154, 155; *Halbut v. Forest City*, 34 Ark. 246.

³ *Lewis v. Shreveport*, 108 U. S. 282.

⁴ *Marcy v. Oswego*, 92 U. S. 637.

within its general power to take, it must pay a fair price therefor.⁵ Furthermore, a transaction binding a municipal corporation may be illegal and yet not *ultra vires*.⁶ Finally, if the corporation has power to grant a license, it may, because of large expenditure by the licensee, be equitably estopped to revoke the license, until to continue it would itself be *ultra vires*.⁷ But if none of these distinctions is involved, it seems clear that a municipal corporation should not be estopped to set up a claim of *ultra vires*, though the hardship on the other party be great.

An Ohio court has recently decided, however, that a city is estopped from enjoining a gas company from maintaining its pipes laid in the streets, whether the ordinance, in reliance on which the company had acted, was *ultra vires* or not. *Darby v. Norwood*, 52 Oh. L. Bul. 253 (C. P. Hamilton Co., Dec., 1906). This result is opposed alike to principle and to authority.⁸ If, as is well settled, a municipal corporation is not liable to the purchasers for value of a great issue of *ultra vires* bonds,⁹ the city enjoys no larger privilege if permitted to enjoin a grantee from using the pipe lines which the latter has laid in the streets. Nor do the decisions, contrary to the intimation of the present case, show equity a court so tender as to refuse its peculiar aid to further a claim of *ultra vires*, for it will enjoin the collection of taxes to pay void bonds.¹⁰ Those cases which allow an estoppel against a municipal corporation, when there has been long adverse user of public property coupled with large expenditures thereon,¹¹ afford some analogy. But these not only are opposed by better reasoning,¹² but also do not involve the more serious question of lack of power.

EFFECT OF AGREEMENTS ON THE CHARACTER OF FIXTURES. — When the courts, yielding to business necessity, relaxed the common law rule that whatever is annexed to the soil belongs to the soil, and permitted tenants to remove those fixtures which they had erected for purposes of trade or agriculture, there was opened up a possibility for confusion as to the character of such fixtures during the period of annexation. Since they were chattels both before and after that period, many courts adopted the view that they never lost the character of chattels.¹ If, it was further argued, things bearing such a relation to the land as would normally make them a part of it were allowed to retain their original characteristics because of the special relations of the parties, it followed that the same result might be achieved by agreement.² Though this doctrine has been widely accepted and is convenient as between the parties, many courts which profess to recognize it

⁵ *Hitchcock v. Galveston*, 96 U. S. 341.

⁶ *Howell v. Buffalo*, 15 N. Y. 512.

⁷ *Spencer v. Andrews*, 82 Ia. 14.

⁸ *Detroit v. Detroit City Ry. Co.*, 56 Fed. Rep. 867, 892, 893; *State v. Murphy*, 134 Mo. 548; *Smith v. Westerly*, 19 R. I. 437, 446.

⁹ *German Bank v. Franklin County*, 128 U. S. 526.

¹⁰ *Lippincott v. Pana*, 92 Ill. 24.

¹¹ *Paine Co. v. Oshkosh*, 89 Wis. 449.

¹² *London, etc., Bank v. Oakland*, 90 Fed. Rep. 691, 701; *Webb v. Demopolis*, 95 Ala. 116. But see 17 HARV. L. REV. 273.

¹ *Poole's Case*, 1 Salk. 368; *Shapira v. Barney*, 30 Minn. 59. *Contra*, *Guthrie v. Jones*, 108 Mass. 191.

² *Hendy v. Dinkerhoff*, 57 Cal. 3; *Howard v. Fessenden*, 96 Mass. 124; *Harris v. Hackley*, 127 Mich. 46. See *Fitzgerald v. Anderson*, 81 Wis. 341.

decline to adjust the rights of third parties on that basis.³ New York, however, has consistently applied it to all the situations which have arisen, except where the thing attached had become so merged in the land as to lose its identity.⁴

In a recent case in the Court of Appeals, one who purchased an engine, subject to the agreement that it should remain personalty until the purchase price was paid, attached it to land of which he was in possession under a contract of purchase containing a provision that whatever machinery should be attached to the land should become realty. The court permitted the seller of the chattel to recover the unpaid purchase price from the vendor of the realty. *Davis v. Bliss*, 187 N. Y. 77. This situation seems to test the soundness of the New York doctrine. It is evident that the person whose agreement can preserve to a fixture its character as a chattel is not the owner of the chattel, but the occupier of the land, who is to annex the chattel.⁵ If, then, that person has previously contracted with the owner of the land that the thing shall not retain its character as a chattel, the court is placed in the embarrassing position of deciding which of these promised results has been achieved;⁶ or else, since the two agreements are inconsistent, of refusing to consider either as affecting the character of the property. The only possible guide to a choice between the agreements would be the actual intent of the annexor. But the danger in permitting such a person to elect which of the two others shall be preferred is sufficiently apparent. If neither agreement is regarded, the rules applicable under normal circumstances determine the thing to be a part of the land. Therefore, if the rights of the seller of the chattel are to be contingent on its remaining a chattel, this doctrine carried to a logical conclusion must deny him any relief. But fairness demands that he be protected. He has parted with possession of his chattel on conditions to which the law usually gives effect. The vendor of the land, on the other hand, cannot properly demand as security for his purchase price anything more than his vendee equitably had in the thing,⁷ — that is, an equity of purchase in the engine. It is believed that the desirable result of the present case may best be achieved by a return to the older principles of our law. After determining whether or not a thing has lost its character as a chattel, in accordance with rules to be uniformly applied regardless of personal agreements,⁸ those inequitable situations which arise may be adjusted according to recognized equitable principles.⁹

LIABILITY OF PARTIES TO LOST PROMISSORY NOTES. — The loser of a promissory note, if he wishes to fix the liability of an indorser, must, as usual, make demand on the maker at maturity and give prompt notice to the indorser.¹ Whether he must simultaneously tender a bond of indemnity

³ *Richardson v. Copeland*, 72 Mass. 536; *Wickes v. Hill*, 115 Mich. 333.

⁴ *Holmes v. Tremper*, 20 Johns. (N. Y.) 29; *Ford v. Cobb*, 20 N. Y. 344.

⁵ *Jermyn v. Hatch*, 93 N. Y. App. Div. 175.

⁶ See *McCrillis v. Cole*, 25 R. I. 156.

⁷ *Campbell v. Roddy*, 44 N. J. Eq. 244; *Hurxthal v. Hurxthal*, 45 W. Va. 584.

⁸ *Reynolds v. Ashby*, [1904] A. C. 466; *Fifield v. Farmers' Bank*, 148 Ill. 163. See *Prescott v. Wells*, 3 Nev. 82, 89.

⁹ *Bringholff v. Munzenmaier*, 20 Ia. 513; *Davenport v. Shants*, 43 Vt. 546.

¹ *Hinsdale v. Miles*, 5 Conn. 331.

to the maker is not so clear. If the lost note is of such a character that equities will be cut off if it reaches a *bona fide* purchaser, the law is well settled that a demand must be accompanied by such tender. Otherwise the maker, though free from any fault, might be compelled to pay a second time and be relegated to his remedy against the possibly insolvent loser.² If, however, equities would not be cut off, because the note when lost was over-due, or undorsed, or indorsed specially, there is a conflict as to whether tender of a bond is necessary. It is true that in such a case the maker would be under no obligation to pay the note when presented; but nevertheless he would be at the mercy of an unscrupulous loser who might misstate the condition of the instrument when lost, and in any event he might be subjected to a suit by the later holder, the expenses of defending which should be borne by the loser of the note. It is submitted, therefore, that to make refusal on demand wrongful, an offer of a bond of indemnity, or its equivalent, should in all cases accompany the demand.³ The maker will of course remain liable, even though the demand was invalid, until the statute of limitations has run.⁴ An action at law is permitted in jurisdictions which so merge law and equity that proper protection by way of indemnification can be given the defendant in such action.⁵ In any event there will be the basis for a bill in equity.⁶

As to the indorser, however, since he, being liable only secondarily, is not bound to pay unless the maker is in default, the question whether a bond is necessary is very material. If it is agreed that the maker is never in default without tender of security, then of course the indorser is completely absolved. Assuming, however, that security is tendered the maker, or that the question arises in a jurisdiction which regards the maker's refusal to pay as wrongful though no bond be tendered, clearly the indorser stands as much in need of the protection of a bond as the maker. Indeed, what scant authority there is upon the point is to the effect that the indorser can in no event be held, either on the note⁷ or on the original consideration,⁸ because he needs the instrument for his remedy over against the maker. This solution seems undesirable and unnecessary. The loser should be allowed to join all parties on the note in equity, where a decree could be had that he be paid by the maker if solvent, or by the indorser if the maker were insolvent. The loser, for his part, should be required to give a bond of indemnity broad enough to protect all parties not only from loss by a second payment, but also from expenses arising from maintaining or defending a possible later action.

If the indorser, though not in default, agrees with knowledge of the facts to pay the loser, it is generally held, without much regard for the difficulty as to consideration, that the loser may enforce the agreement.⁹ If, as in a

² See 2 Daniel, Neg. Inst., 5 ed., §§ 1480, 1481, and cases cited.

³ Wade v. New Orleans Canal, etc., Co., 8 Rob. (La.) 140; Welton v. Adams & Co.,

⁴ Cal. 37. *Contra*, Citizens Nat'l Bank v. Brown, 45 Oh. St. 39. Cf. 11 HARV. L. REV. 125. See also First Nat'l Bank of Denver v. Wilder, 104 Fed. Rep. 187.

⁵ Greeley v. Whitehead, 35 Fla. 523.

⁶ Fales v. Russell, 16 Pick. (Mass.) 315; First Nat'l Bank of Denver v. Wilder, *supra*.

⁷ Hansard v. Robinson, 7 B. & C. 90.

⁸ Tuttle v. Standish, 4 Allen (Mass.) 481. But cf. Savannah Nat'l Bank v. Haskins, 101 Mass. 370. Cf. also Smith v. Rockwell, 2 Hill (N. Y.) 482.

⁹ Champion v. Terry, 3 B. & B. 295.

¹⁰ Burgettstown Nat'l Bank v. Nill, 213 Pa. St. 456. See 3 L. R. A. (N. S.) 1079 n.

recent Michigan case, the indorser actually pays, since the transaction is then executed, the difficulty as to consideration drops out, and the indorser has no redress against the loser. *Rogers v. Detroit Savings Bank*, 110 N. W. Rep. 74. If, however, the indorser paid in ignorance of the facts, a court would doubtless reach the opposite result. The merit of the loser in such a case could hardly be said to be equal to that of the indorser, and therefore the doctrine of prior equities would have no application.

WHETHER A POWER TO SELL INCLUDES A POWER TO MORTGAGE. — Whether a power of sale be given to an agent, mortgagee, trustee, executor, or life tenant, the factor determining the extent of the power conferred should in all cases be the intent of the donor. If no absolute intent appears on the face of the power, the presumption may vary according to the character of the estate created, the purposes of the power, and the status of the donee.¹ If the donor retains an interest in the proceeds of the authorized sale, the fair presumption is that the estate was intended to be converted absolutely, and on this ground neither a power of attorney to an agent to sell nor a power of sale mortgage will authorize a mortgage or other encumbrance on the estate.² When land is conveyed or devised to trustees or executors, the old English rule that a mortgage, being a conditional sale, was impliedly authorized,³ has been modified,⁴ so that now the generally accepted rule is that in such cases a power of sale authorizes a mortgage only when the purpose is to pay off debts or charges on the land, or to raise a specific fund:⁵ if the intention of the settlor or testator can be fulfilled as well or better by a mortgage, the mortgage is authorized. The presumption in favor of an actual sale seems justified; for the obvious expectation was that the *cestui* or estate should receive an adequate price for the land, and this may be defeated if a mortgage is given and foreclosed. If the trustee is to re-invest the proceeds of the sale on similar trusts, it is well settled that a mortgage is a breach of duty;⁶ and although in some cases a mortgage may be for the benefit of the *cestui*, the courts have applied the rule strictly. If an absolute power of sale in fee is given to a life tenant, there can be no valid objection to a mortgage; the tenant has all the beneficial interest in the power and should have sole control over the exercise and interpretation of it.⁷ The remainderman should not be heard to object that he receives an encumbered estate instead of none at all. But if the tenant is to take only a life interest in the proceeds of the sale, then the injury to the remainderman should be decisive;² for a vested remainder in an unencumbered estate should not without his consent be turned into a mere equity of redemption. The fiduciary situation of the life tenant in regard to the proceeds should be sufficient to invalidate a mortgage.

¹ See *McMillan v. Cox*, 109 Ga. 42, 49.

² See *Bloomer v. Waldron*, 3 Hill (N. Y.) 361, 367.

³ See *Mills v. Banks*, 3 P. Wms. 1, 9.

⁴ See cases collected in *Lewin, Trusts*, 11 ed., 497.

⁵ *Loebenthal v. Raleigh*, 36 N. J. Eq. 169; *Stroughill v. Anstey*, 1 De G. M. & G. 634. See 19 HARV. L. REV. 64.

⁶ *Patapsco Guano Co. v. Morrison*, 2 Woods (U. S.) 395. See *First Nat'l Bank v. Nat'l Broadway Bank*, 156 N. Y. 459, 471. But cf. *In re Lueft*, 109 N. W. Rep. 652 (Wis.).

⁷ *Kent v. Morrison*, 153 Mass. 137.

The exception in favor of a purchase-money mortgage given to the settlor at the time of the conveyance is not in conflict with these principles. It may be justified either on the ground that the donor of the power has expressly authorized the mortgage by accepting it, or by the rule that the conveyance and mortgage should be construed as one instrument, and that therefore only an equity of redemption was in fact conveyed.⁸ Accordingly, a recent Maryland case held that when land was settled in trust for A for life, remainder over, with a power in A to convey the fee and to invest the proceeds on similar trusts, a purchase-money mortgage made by A to the settlor was good, although a second mortgage given by A to the assignees of the first mortgage was invalid. *Stump v. Warfield*, 65 Atl. Rep. 346. It seems settled that a power of sale does not include the right to exchange,⁹ partition,¹⁰ contract to sell on credit,¹¹ or transfer gratuitously;¹² and following these analogies a power of sale should be construed strictly so as to make a mortgage valid only when exceptional circumstances indicate an implied authority.

RECENT CASES.

ANIMALS — TRESPASS ON REALTY BY ANIMALS — STRAYING FROM HIGHWAY. — The defendant's cattle, while being driven along a public highway, escaped without negligence on the part of the driver and went upon the adjoining unfenced lands of B, over which they passed to the unfenced lands of the plaintiff. *Held*, that the plaintiff may recover for the trespass. *Wood v. Snider*, 187 N. Y. 28.

At common law the owner of cattle was bound to keep them from straying on another's land, whether that land was fenced or not. *Tonawanda R. R. Co. v. Munger*, 5 Den. (N. Y.) 255. This strict rule has been modified in the case of land adjoining a highway, when the driver of the cattle is not negligent. *Tillett v. Ward*, 10 Q. B. D. 17; *Hartford v. Brady*, 114 Mass. 466. A possible explanation of the exception is that, since the owner of the cattle is unable to fence against straying, the law casts the burden upon the adjoining owner. The purpose of a fence is to restrain cattle from straying rather than to prevent trespassing by those of the adjoining owner. See *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116. The highway exception, however, only applies when the cattle are rightfully on the highway. *Mills v. Stark*, 4 N. H. 512. It would therefore follow that the exception should not be extended to a remote owner, for, as the cattle are not rightfully on the adjoining owner's land but there only with a justification, their further trespass on the lands of the remote owner is not excused by the want of a fence. See *Lord v. Wormwood*, 29 Me. 282.

BANKRUPTCY — DISCHARGE — PARTNER'S LIABILITY BARRED BY INDIVIDUAL DISCHARGE. — The defendant had been discharged in voluntary individual bankruptcy proceedings, his schedule including a debt to the plaintiff, who was properly notified. No mention was made in the petition, schedule, or discharge, of firm liabilities. *Held*, that, conceding the debt to the plaintiff to be a firm obligation, the defendant's liability on it was discharged by the individual discharge, whether there were any firm assets or not. *New York Institu-*

⁸ *Coutant v. Servoss*, 3 Barb. (N. Y.) 128. Cf. *Boies v. Benham*, 127 N. Y. 620.

⁹ See *Woodward v. Jewell*, 140 U. S. 247, 253.

¹⁰ Cf. *Paget v. Melcher*, 42 N. Y. App. Div. 76.

¹¹ See *Repetto v. Baylor*, 61 N. J. Eq. 501, 506.

¹² *Stocker v. Foster*, 178 Mass. 591.

tion for Deaf and Dumb v. Crockett, 36 N. Y. L. J. 1535 (N. Y., App. Div., Jan., 1907).

The Bankruptcy Act provides for the bankrupt's discharge from all provable debts with certain express exceptions. Since it is recognized that firm debts are provable against a bankrupt partner's estate, the conclusion that the above provision covers such obligations seems sound. Such is the weight of authority under both the Act of 1867 and that of 1898. *Wilkins v. Davis*, Fed. Cas. 17664; *In re Diamond*, 149 Fed. Rep. 407; but see *In re Freund*, 1 Am. B. Rep. 25. § 5 h of the Act of 1898, providing for the management of the firm estate by the solvent partners, and § 16, providing that their liability on firm obligations shall not be affected by the individual bankrupt's discharge, clearly contemplate such a result. Many decisions, however, differ from the present in holding that there can be no discharge of firm debts unless they are specifically mentioned as such in the petition and discharge. *In re Morrison*, 127 Fed. Rep. 186; but cf. *Jarecki Mfg. Co. v. McElwaine*, 107 Fed. Rep. 249. The contention is also made that only where there are no firm assets will firm liabilities be discharged. See *Curtis v. Woodward*, 58 Wis. 499, 506. These distinctions, however, seem unsound, since they impose limitations for which the Act itself makes no provision.

BANKRUPTCY — JURISDICTION OF STATE COURTS — DETERMINATION OF TITLE TO PROPERTY IN POSSESSION OF TRUSTEE. — A vendor of chattels rescinded the sale because of fraud, brought action in a state court to recover them, and attached the property on mesne process. The trustee appointed in subsequent bankruptcy proceedings against the buyer took possession of this property, and was made a party to the action in the state court. Judgment was there rendered for the vendor. His application to the court of bankruptcy for delivery of the goods was contested on the ground that the state court was without jurisdiction. *Held*, that the adjudication by the state court is conclusive. *Linstroth Wagon Co. v. Ballew*, 149 Fed. Rep. 960 (C. C. A., Fifth Circ.).

With certain express exceptions, it is the purpose of the Bankruptcy Act to leave the adjudication of all questions, except those which fall within the somewhat indefinite category of "proceedings in bankruptcy," to those courts in which actions by or against the bankrupt, were he a solvent person, could have been brought. *Bardes v. Bank*, 178 U. S. 524; see *In re Abraham*, 93 Fed. Rep. 767. This would seem to leave with the state courts jurisdiction of claims for goods, whether in possession of the trustee or of the bankrupt. But the Supreme Court has taken the view that property in possession of the trustee is in the custody of the bankruptcy court and that process of a state court is not effectual to recover it. *White v. Schloerb*, 178 U. S. 542. It follows that a claimant of such property can maintain in the state court trespass or trover, but not replevin, against the trustee. *In re Russell*, 41 C. C. A. 323; see *Crosby v. Spear*, 98 Me. 542; *contra*, *Cooke v. Scovel*, 68 N. J. L. 484. In this case, however, as the state court, by attaching the goods before the bankruptcy proceedings, obtained custody prior to the bankruptcy court, its jurisdiction over the action is unquestionable.

BANKRUPTCY — PARTIES IN INTEREST. — Two debtors of the bankrupt filed objections to the allowance of certain claims, alleging that their position would be prejudiced by the allowance. *Held*, that the petitioners, not having an interest in the *res*, are not parties in interest and have no standing in court. *In re Sully*, 36 N. Y. L. J. 1971 (C. C. A., Second Circ., Feb., 1907).

Under § 57 d of the Bankruptcy Act claims are allowed unless, among other things, objections are made by "parties in interest." This phrase is also used to designate who may apply to set aside a composition, to object to a discharge, or to revoke a discharge. A creditor who has been scheduled as such, though he has not proved his claim, is within the meaning of the term in order to oppose a discharge. *In re Frice*, 96 Fed. Rep. 611. And he has been given this right even when proof of his claim has been barred by the expiration of the time allowed by the Act. *In re Bimberg*, 121 Fed. Rep. 942. But the present case seems correct in restricting petitions to oppose the allowance of claims to those

who have a direct interest in the administration of the bankrupt's estate. Such restriction must have been intended by Congress, since to allow interference by any one incidentally affected, as in this case, would lead to almost unlimited complication and delay in the adjustment of all bankruptcy proceedings.

BANKRUPTCY — RIGHTS AND DUTIES OF BANKRUPT — PERJURY IN EXAMINATION. — The defendant swore falsely in an examination before a referee in bankruptcy. He was indicted under § 29 *b* (2) of the Bankruptcy Act, which makes it an offense punishable by imprisonment to make a false oath "in relation to any proceeding in bankruptcy." The defendant pleaded the provision of § 7 *a* (9), that "no testimony given by him [the bankrupt] shall be offered in evidence against him in any criminal proceeding." *Held*, that the testimony in which the perjury occurred is admissible. *Edelstein v. United States*, 149 Fed. Rep. 636 (C. C. A., Eighth Circ.).

It is a rule of statutory construction that general terms may be limited to accord with the plain intent of the legislature or to harmonize with other parts of the statute. *Kennedy v. Gies*, 25 Mich. 83. Perjury by a bankrupt in his examination is held by the weight of authority to be a punishable offense within § 29 for the purpose of barring a discharge, although dicta intimate that there could be no conviction or punishment of the offense because of the inadmissibility of the testimony. *In re Gaylord*, 112 Fed. Rep. 668; *contra*, *In re Mark*, 102 Fed. Rep. 676. The literal construction of the immunity clause would interpret the Act as preventing by one section the punishment of an offense created by another section. Since that construction fails to harmonize these provisions of the Act and violates the plain intent of the legislature not to place a premium on perjury, the construction of the present court seems sound in limiting the immunity clause to offenses disclosed by the testimony. *Contra*, *United States v. Simon*, 146 Fed. Rep. 89.

BILLS AND NOTES — PAYMENT AND DISCHARGE — REMEDIES ON LOST INSTRUMENT. — The defendant, a holder for value of a promissory note indorsed by the plaintiff, the payee, lost it. At maturity, without tendering a bond of indemnity, he demanded payment of the maker, who refused to pay. Thereupon the plaintiff, with knowledge of the facts, paid the defendant. The maker became insolvent, and the plaintiff sued for damages. *Held*, that he cannot recover. *Rogers v. Detroit Savings Bank*, 110 N. W. Rep. 74 (Mich.). See NOTES, p. 566.

CARRIERS — STREET RAILWAYS — CONTINUOUS TRANSPORTATION IN ONE CAR. — The plaintiff boarded the defendant's street-car at a time when the motorman knew that, because of a disarranged schedule, his car would not complete the trip indicated by its sign; but no notice of this was given the plaintiff. The plaintiff refused to transfer to a car ahead, and sued the defendant for failing to carry him to his destination in the original car. *Held*, that he can recover. *Burrow v. Norfolk Ry. & Light Co.*, 12 Va. L. Reg. 763 (Va., Corp. Ct. Norfolk, Feb., 1907).

This case raises one of the numerous problems in the law of carriers where, in order to determine what regulation is reasonable, the convenience of the company and of the entire public must be considered as well as the convenience of the plaintiff. *Cf. Faber v. Railway Co.*, 62 Minn. 433. In the only other case found bearing on this particular point the company was held not liable. *O'Connor v. Halifax Tramway Co.*, 37 Can. Sup. Ct. 523. But there some notice had been given that the car would not complete the trip indicated by its sign, and the circumstances were otherwise exceptional. The argument advanced in the present decision, that notice of the intended change must be given to passengers boarding the car, seems rather unreasonable. Of course, passengers compelled to change have a remedy for any failure to provide proper seating facilities in the cars to which they are transferred. *Louisville, etc., R. R. Co. v. Patterson*, 69 Miss. 421; see *Camden, etc., R. R. Co. v. Hoosey*, 99 Pa. St. 492, 497. A statute or city ordinance may impose a penalty for putting passengers to the inconvenience of changing unless it is unavoidable. Such an

ordinance has been held reasonable. *City of New York v. Interurban St. Ry. Co.*, 43 N. Y. Misc. 29.

CONFLICT OF LAWS — EFFECT AND PERFORMANCE OF CONTRACTS — CONTRACT TO PERFORM TO SATISFACTION OF OTHER PARTY IN ANOTHER STATE. — The plaintiff, by his New York agent, made a written contract in Illinois to install machinery in Iowa. The contract provided that payment should not be required until the machinery was "to the full satisfaction" of the defendant in certain regards. By the law of New York and of Illinois the promisee's dissatisfaction in such case must be reasonable; by that of Iowa it need only be honest. The plaintiff sued for the price in Iowa. *Held*, that evidence is inadmissible to show the New York-Illinois meaning. *Inman Mfg. Co. v. American Cereal Co.*, 110 N. W. Rep. 287 (Ia.). See NOTES, p. 558.

CONFLICT OF LAWS — LEGITIMACY AND ADOPTION — LEGITIMATION SUBSEQUENT TO BIRTH. — A New York man deserted his wife and purported to marry a New Jersey woman, who bore him two children. Thereafter he became domiciled with his family in Michigan, obtained a divorce there from his New York wife without personal service and by default, and went through a second marriage ceremony with the New Jersey woman. This divorce and remarriage a New York court by decree refused to recognize. By Michigan law illegitimate children become legitimate by the subsequent marriage of their parents. The children claimed New York realty under a devise as the "lawful issue" of their father. *Held*, that they take. *Olmsted v. Olmsted*, 36 N. Y. L. J. 2073 (N. Y., App. Div., March, 1907).

This reverses the decision of the lower court, criticized in 20 HARV. L. REV. 400.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — ADMINISTRATION OF ESTATE OF LIVING PERSON. — A wife, whose husband had not been heard from for eight years, petitioned to have his will admitted to probate under a statute which declared that a person should be presumed dead at the termination of seven years from the time when such person was last heard from. *Held*, that the will be admitted to probate. *In re Sternkopf*, 65 Atl. Rep. 177 (N. J., Prerogative Ct.).

See, for a discussion of the principles involved, 19 HARV. L. REV. 535.

CORPORATIONS — DIRECTORS — LIABILITY OF CORPORATION FOR EXPENSE OF NOTICES OF MEETING OF SHAREHOLDERS. — The directors of a corporation, for the purpose of calling a meeting of the shareholders to consider a dispute existing between the directors and the president, published through the plaintiff four advertisements in newspapers. The first was simply a notice of the meeting; the second urged the shareholders to execute and return in favor of the directors proxies previously sent out; the third and fourth stated the history and merits of the dispute. The plaintiff sued the corporation for its services. *Held*, that there can be recovery only for publishing the first notice. *Lawyers' Advertising Co. v. Consolidated Ry., etc., Co.*, 36 N. Y. L. J. 2023 (N. Y., Ct. App., Dec. 19, 1907).

For a discussion of the principles involved, see 20 HARV. L. REV. 328.

CORPORATIONS — FOREIGN CORPORATIONS — IMPLIED CONSENT TO SERVICE UPON STATE OFFICIAL. — An insurance company issued a policy in Indiana, running to a citizen of Pennsylvania as beneficiary, on which a judgment was obtained in Pennsylvania by service on the company through the state insurance commissioner, under a statute providing that no foreign insurance company should do business within the state until it had filed with the commissioner an agreement to accept service through him. The company had never filed such a stipulation, but it had transacted business in Pennsylvania. *Held*, that the judgment is void, as consent to service will not be implied here. *Old Wayne Mutual Life Ass'n v. McDonough*, 204 U. S. 8.

Statutes of many states now provide that foreign corporations doing business within the state must appoint some state official or other person to accept ser-

vice for them. It is the doctrine of the federal courts that a corporation actually doing business within a state, without complying with such provision, may nevertheless be validly served in accordance with the requisition of the statute. *Conn. Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602; but *cf. Rothrock v. Dwelling House Ins. Co.*, 161 Mass. 423. But courts are strongly inclined to construe such statutes as limited to litigation concerning business done within the state. *Bawknight v. Ins. Co.*, 55 Ga. 194. However, the United States Supreme Court, in a case where a corporation had done business within the state, took jurisdiction, although the cause of action arose outside the state, and intimated that a state might by statute provide for such jurisdiction. *Barrow Steamship Co. v. Kane*, 170 U. S. 100. Although, if the present decision involves merely a construction of the statute, it raises no new question, yet the reasoning of the court suggests that even if the statute expressly included causes of action arising outside the state, the doctrine of implied consent to service would not be applied.

CORPORATIONS — STOCKHOLDERS' INDIVIDUAL LIABILITY TO CREDITORS — LIABILITY FOR STOCK ISSUED FOR OVERVALUED PROPERTY. — The defendants, owning a brick plant worth \$36,000, sold it to a corporation for \$75,000 in paid-up stock, honestly believing it worth that much. The corporation became insolvent, and its trustee brought suit on behalf of creditors for additional payment on the stock so issued. *Held*, that the defendants need not pay. *Hemenway v. Honolulu Clay Co.*, [1907] Haw. 187.

For a discussion adverse to this holding, see 19 HARV. L. REV. 366.

CORPORATIONS — ULTRA VIRES — EFFECT OF BEQUEST AND DEVISE TO CORPORATION IN EXCESS OF CHARTER LIMITATIONS. — The defendant corporation, the residuary devisee and legatee of S, was authorized by law to hold realty and personalty to an amount not exceeding \$1,500,000. The residuary devise and bequest amounted to \$3,000,000. After the death of S, the legislature passed an act increasing the amount of realty and personalty which the defendant might hold to \$5,000,000. The heirs and next of kin of S claimed the property so devised and bequeathed by him. *Held*, that the defendant is entitled to hold against all the world, the state having waived any rights it might have had. *Hubbard v. Worcester Art Museum*, 80 N. E. Rep. 490 (Mass.). See NOTES, p. 561.

CRIMINAL LAW — APPEAL — CONVICTION ON MERITS UNDER DEFECTIVE INDICTMENT. — The defendant was indicted for adultery in the Philippine Islands, where he was entitled to be informed of the nature of the crime charged and to due process of law as provided in the Constitution of the United States. Every element of the crime was proved at the trial, but the indictment omitted one essential averment. Having failed to object to the defect before judgment, the defendant raised the point on appeal, but the judgment was affirmed. *Held*, that the defendants' rights have not been infringed. One justice dissented. *Serra v. Mortiga*, U. S. Sup. Ct., Feb. 25, 1907.

The court relies on a former decision where it was held, on the ground of double jeopardy, that an acquittal on the merits was a bar to a second trial, even though the indictment was fatally defective. *United States v. Ball*, 163 U. S. 662. That doctrine seems sound, although contrary to generally established law. See 10 HARV. L. REV. 243. But there the defect was overlooked in order to protect the constitutional right of exemption from double jeopardy; a similar disregard for irregularity in the present case tends to deprive the defendant of constitutional rights. However, since the entire crime was proved, the defendant has had substantial justice, and it would seem that he was properly held to have waived his right to object. But if the crime involved punishment by death, the interest of the state in the life of a citizen would prevent a waiver from being effective even though it had been express. *Hopt v. Utah*, 110 U. S. 574. A few cases have been found in accord with the present. *Eaves v. State*, 113 Ga. 749; see *People v. Moran*, 43 N. Y. App. Div. 155; aff. 161 N. Y. 657. But the general view has been to the contrary. *Com. v. Doyle*, 110 Mass. 103.

DEEDS — EXCEPTIONS AND RESERVATIONS — EXCEPTION OF LAND IN WHICH EASEMENT PREVIOUSLY GRANTED. — M granted a strip of land to a railway, by a deed which the court construed to give only an easement. Later M conveyed the tract to the plaintiff's grantor, "excepting a strip of land . . . heretofore deeded to the railway . . . now occupied by the . . . road." A successor of the railway ceased, for eleven years, to use the land. The plaintiff claimed the fee. *Held*, that the fee was excepted, so that the plaintiff has no title. *Spencer v. Wabash Railway Co.*, 109 N. W. Rep. 453 (Ia.).

The court's construction that M, by the language used, excepted a fee from her grant is supported by authority. *Munn v. Worrall*, 53 N. Y. 44; *Reynolds v. Gaertner*, 117 Mich. 532. However, there is much weight in the view of the dissenting judges that there was a conveyance of the entire interest and that the exception, in effect, operated only as a limitation upon the covenants of warranty. *Gould v. Howe*, 131 Ill. 490. It seems improbable that M intended to retain so small an interest in the land; and, where reasonable, the minority's construction would generally be highly desirable, since a separate ownership of such strips decreases their usefulness and is productive of litigation. Granting that a fee was excepted, the case seems opposed to an earlier Iowa decision, which it did not purport to overrule, holding that when an easement is abandoned by a railway, the land belongs to the present owners of the tract of which it had been a part, although it had never been conveyed to them. *Smith v. Howe*, 103 Ia. 95; see IOWA CODE 1897, § 2015.

ELECTIONS — WHETHER VOTING BY BALLOT MEANS BY SECRET BALLOT. — The state constitution provided for voting by ballot. A statute required all ballots to be numbered for purposes of identification in case of a contested election. *Held*, that the statute is constitutional. *Ex parte Owens*, 42 So. Rep. 676 (Ala.).

It is undoubtedly true that the element of secrecy in voting by ballot is the feature of the system which caused its widespread adoption. As a matter of definition, however, it can hardly be said that a ballot has ever been considered to lose its character entirely, merely because the identity of the voter could be subsequently disclosed. See 1 BOUV. L. DICT. 216. The word as used in a constitution, therefore, does not necessarily imply absolute secrecy, and without such implication the statute in question is valid. See *People v. Fisher*, 24 Wend. (N. Y.) 215. The fact that the effect of a statute seems contrary to the intent of the framers of the constitution or to public policy should not of itself make the act unconstitutional. *State v. McLelland*, 138 Ind. 395. It is believed that the failure to recognize this last principle accounts for the view contrary to that of the present case, which is taken in the only other cases found which raise this exact point. *Williams v. Stein*, 38 Ind. 89; *Brisbin v. Cleary*, 26 Minn. 107.

EMINENT DOMAIN — COMPENSATION — CLAIM IN RESPECT OF POSSESSORY TITLE. — Land occupied by a trespasser as his own for ten years was taken by the crown under a resumption statute. No valuation was made nor compensation given. When the period of limitation after the trespasser's entry had elapsed and the true owner had not appeared, the executors of the trespasser demanded that the proper officer value the land. He refused on the ground that the executors could have no claim for compensation. *Held*, that *mandamus* issue to compel the valuation. *Perry v. Clissold*, [1907] A. C. 73. See NOTES, p. 563.

EMINENT DOMAIN — RIGHT TO ABANDON PROCEEDINGS. — A railway company instituted proceedings to condemn land, and after the damages had been assessed and the judgment entered attempted to abandon the project. *Held*, that the company cannot withdraw. *Union Ry. Co. v. Standard Wheel Co.*, 149 Fed. Rep. 698 (C. C. A., Sixth Circ.).

It is held by the weight of authority, contrary to the present case, that after the entry of judgment the condemnor ordinarily may withdraw. *City of Chicago v. Barbican*, 80 Ill. 482. The reason is that the condemnor should be allowed to ascertain the expense of the project before finally deciding to proceed. *O'Neil v.*

Freeholders of Hudson, 41 N. J. L. 161. On the other hand, it has been held that after the land-owner, has been put to the inconvenience of condemnation proceedings, he should be entitled to enforce the judgment. *Drath v. Burlington, etc.*, R. R. Co., 15 Neb. 367. This argument is not of great weight, since the court may require the condemnor in case of abandonment to make good any loss occasioned by the proceedings. In *Matter, etc., Waverly Water Works Co.*, 85 N. Y. 478. In some instances, however, the condemnor must proceed after a confirmation of the damages assessed has been made by the court at his request. *Matter of Rhinebeck, etc., R. R. Co.*, 67 N. Y. 242. But after mere assessment of damages the right to abandon should be allowed, though it must be exercised within a reasonable time in order to protect the land-owner. *State of Ohio v. C. & I. R. R. Co.*, 17 Oh. St. 103. Some cases which refuse the right to withdraw depend on the wording of the statute. *Stafford v. Mayor, etc., of Albany*, 7 Johns. (N. Y.) 541.

EQUITY — SPECIFIC PERFORMANCE — LACK OF MUTUALITY OF REMEDY AS DEFENSE. — The assignee of an insolvent corporation sold its real estate, agreeing to procure the resignation of the old officers and directors. Having done so, he filed a vendor's bill for specific performance. Held, that the vendee's original lack of mutuality of remedy is no defense. *Kentucky Distilleries, etc., Co. v. Blanton*, 149 Fed. Rep. 31 (C. C. A., Sixth Circ.).

For a discussion of the principles involved, see 20 HARV. L. REV. 57.

EVIDENCE — FOREIGN LAW — PROOF TO BE MADE TO COURT. — An action was brought for a tort committed in another state. Proof of apparently conflicting foreign statutes and decisions was made to the court out of the presence of the jury. Held, that this method is proper. *Christiansen v. Graver Tank Works*, 223 Ill. 142.

Although the foreign law must be proved as a fact, jurors are, as a rule, incompetent to deal with such abstruse questions, and this has led to the majority rule in this country which leaves all such proof to the court. *Ferguson v. Clifford*, 37 N. H. 86. Even where there is conflicting oral evidence, so that the credibility of witnesses is involved, the rule is the same. *Hooper v. Moore*, 5 Jones L. (N. C.) 130. The contrary view on this last point seems clearly preferable as preserving to the jury one of its ordinary functions. *Holman v. King*, 7 Met. (Mass.) 384. So, where there is conflicting written evidence, it would seem desirable for the jury to pass upon it. But the present case is undoubtedly correct, though the court evidently intended to adopt the wider rule. For, since the evidence was harmonious, the court construed the written evidence as it would other documents. *Cook v. Bartlett*, 179 Mass. 576. In England an intermediate rule seems to prevail, which requires the court to assist the jury, though the question is ultimately left to the latter. See *Mostyn v. Fabrigas*, 1 Cowp. 161, 174.

FEDERAL COURTS — JURISDICTION — UNITED STATES AS PARTY. — A federal statute required every contractor for public works to execute a bond to the United States conditioned upon performance of the contract and upon payment of persons supplying materials, and further provided that any one supplying materials might sue on this bond to his own use in the name of the United States. A materialman brought an action in a federal court under this statute. Held, that the United States is a real and not merely a nominal party, and that, therefore, the federal courts have jurisdiction. *U. S. Fidelity & Guaranty Co. v. United States*, U. S. Sup. Ct., Feb. 25, 1907.

This decision affirms that of the lower court, which was criticized in 18 HARV. L. REV. 314.

FIXTURES — EFFECT OF AGREEMENTS ON THEIR CHARACTER. — A, in possession of the defendant's mill under a contract of purchase, had agreed that all machinery placed upon the premises should become a part of the realty. He annexed an engine bought from the plaintiff under an agreement that title should remain in the vendor until full payment. After default on both contracts A surrendered to the defendant the mill with the engine still annexed.

Held, that, on refusal to deliver, the plaintiff may sue for conversion of the engine. *Davis v. Bliss*, 187 N. Y. 77. See NOTES, p. 565.

HUSBAND AND WIFE — CREATION OF MARRIAGE RELATION — COMMON LAW MARRIAGE AS AFFECTING BIGAMY. — On an indictment for bigamy the state relied upon proof of a former marriage, accomplished merely by promises *in praesenti* followed by cohabitation by the parties as man and wife. *Held*, that there has been no former marriage to support a conviction. *Bates v. State*, 29 Oh. Circ. Ct. Rep. 189.

An indictment for bigamy cannot, of course, be supported without proof of a former valid marriage. But the view has been generally adopted in this country that promises *in praesenti* followed by cohabitation accomplish a valid marriage, even under marriage statutes which are mandatory in form, unless they contain express words to the contrary. *Meister v. Moore*, 96 U. S. 76; *Heymann v. Heymann*, 218 Ill. 636; *contra*, *Dunbarton v. Franklin*, 19 N. H. 257. The court in the present decision recognizes as authoritative a case in which a conviction for bigamy was supported, although the person who solemnized the marriage had not the required authority. *Carmichael v. State*, 12 Oh. St. 553. It is true that the English rule, explained by the necessity there of some religious solemnity, conflicts with that decision. *Catherwood v. Caslon*, 13 M. & W. 261. But it seems difficult to find any satisfactory reason for refusing to apply the principle recognized in the earlier Ohio decision — namely, that compliance with statutory requirements is not essential to a binding marriage — to the facts in the present case. General policy favors supporting common law marriages, and there seems to be no good reason for rejecting them in criminal prosecutions and supporting them in civil actions.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — ATTORNEYS' FEES FOR SOLICITED BUSINESS. — The plaintiffs, a firm of attorneys, solicited a large number of claims for personal injuries and brought suit thereon. The defendants compromised with the claimants without the consent of the attorneys, and the latter sued the defendants for the fees promised by the claimants. *Held*, that the contracts obtained by the solicitation of the attorneys are invalid. *Ingersoll v. Coal Creek Coal Co.*, 98 S. W. Rep. 178 (Tenn.).

This case seems the first of its kind. Others resembling it have included the additional element of maintenance. See *Gammons v. Johnson*, 76 Minn. 76. But this contract was objectionable neither on that ground nor because of the promise of a contingent fee. The decision must be based solely upon public policy, which forbids such professional impropriety and so close an approach to barratry. To solicit causes of action tends to promote litigation and to degrade the profession. That such practice is regarded as undesirable is shown by the decisions which declare void attorneys' contracts to pay for business brought to them. See *Alpers v. Hunt*, 86 Cal. 78. And New York makes the formation of such a contract a misdemeanor. N. Y. CIVIL CODE, § 74. Although the court could rely upon neither statute nor precedent, it exercised a well-recognized and proper discretion in thus asserting public policy. See *Jones v. Randall*, 1 Cowp. 37, 39. In the absence of a statute the facts of this case would not justify disbarment, since they do not show that the attorneys lacked the mental or moral qualities necessary in members of the profession. Discreditable behavior in itself is not sufficient. *Dickens' Case*, 67 Pa. St. 169.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — STATE JURISDICTION TO HOLD UNREASONABLE CHARGES POSTED AND FILED UNDER ACT OF 1887. — A shipper sued a railway in a state court to recover an alleged overcharge on an interstate shipment. The rate exacted by the carrier was that fixed by the schedules which it had posted and filed with the Interstate Commerce Commission in compliance with the Act to Regulate Commerce of 1887. § 22 of the Act expressly saved common law remedies, and § 9 expressly conferred on federal courts jurisdiction of offenses within the Act, of which overcharging was one. *Held*, that the action cannot be maintained. *Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co.*, U. S. Sup. Ct., Feb. 25, 1907.

The court recognizes that the common law gives a shipper a right to recover overcharges by a carrier on an interstate shipment. *W. U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92. The decision rests wholly on the basis that the Act of 1887 impliedly deprived state and federal courts of the power to declare duly scheduled rates unreasonable, unless the Interstate Commerce Commission has previously found them so. Both the apparently contrary provisions of the Act the court overrides by an implication based on its general scope and purpose. The underlying ground is the confusion that would spring from a contrary result in view of the provisions of the Act as to discrimination. For § 6 forbids a carrier to charge more or less than the scheduled rate. This rate is thus made a standard, and even contracts to depart from it are unenforceable. *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242. It is plain, then, that the very compliance by a carrier with a state judgment would be a violation of the Act. Furthermore, the Commission was created to deal with the determination of rates, and it would be against the policy of the Act to take questions of reasonableness wholly from that board, and leave them to juries incapable of adequately meeting them. *Kinnavey v. Terminal Ry. Ass'n*, 81 Fed. Rep. 802.

INTERSTATE COMMERCE — CONTROL BY STATES — TRAVELLING SALESMEN SOLICITING ORDERS FOR LIQUOR. — A state statute imposed a license charge upon travelling salesmen soliciting orders for intoxicating liquor. The defendant, representing a firm in another state, solicited from residents proposals to buy liquor for their own use. If his firm accepted them, it shipped the liquor from its own state to the buyers. The defendant was prosecuted for not having paid the license charge. *Held*, that the statute, being a police regulation, is not invalid as a restriction on interstate commerce, and that conviction of the defendant under it is proper. *Delamater v. State*, U. S. Sup. Ct., March 11, 1907.

The state's police power is allowed by the Wilson Act to extend over imported liquor, though still in the original package. 26 U. S. STAT. AT L. 313, c. 728. Aside from the question of interstate commerce, the police power is competent to regulate not only the sale of liquor but also the keeping of it for the owner's consumption. *Mugler v. Kansas*, 123 U. S. 623. Therefore, solicitation to purchase liquor, for selling or keeping, is naturally within the police power also. The opinion, however, raises a difficulty by stating that the police power does not, even under the Wilson Act, extend over liquor received from another state for the receiver's own consumption. See *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25. If this be sound, the defendant's soliciting seems, contrary to the decision, which is based on the alleged analogy of life insurance cases, unobjectionable. However, the true rule would seem to be that, though by the Wilson Act shipments are not subject to police regulation until delivery, nevertheless the solicitation of shipments is subject to it entirely. For since the ultimate act, whether of selling or keeping, should be subject to the police power, the fact that the solicitation of the preliminary step of transportation is lawful may be practically disregarded.

LANDLORD AND TENANT — COVENANTS IN LEASES — WHETHER COVENANT INDIRECTLY AFFECTING VALUE RUNS WITH LAND. — A lease from A to B contained a proviso for reentry in case of breach of B's covenant to repair. In making a sublease of part of the premises to C, B covenanted that he would repair the part of the premises retained. The defendant, B's assignee, failed to repair; whereupon A reentered and ejected the plaintiff, C's assignee. *Held*, that B's covenant to C did not run with the land sublet so as to give C's assignee a right of action. *Dewar v. Goodman*, 23 T. L. R. 225 (Eng., K. B. D., Jan. 11, 1907).

It is agreed that performance on the premises is not essential to covenants running with the land, but difficulty is met in determining what covenants to be performed elsewhere will run. The more extreme view of some American cases is that a covenant indirectly affecting the value of land to the holder will run, as in the case of an agreement not to establish a competing business on neighboring land. *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Nat'l Union*

Bank v. Segur, 39 N. J. L. 173. In these jurisdictions the present defendant would probably have been liable. By the more conservative view, however, such a covenant by a lessor will not run with the leased premises. *Thomas v. Hayward*, 4 Exch. 311. In general, a covenant running with the land must have a direct effect, independent of collateral circumstances, upon the nature, quality, or value of the thing demised, or upon the mode of enjoying it. *Mayor of Congleton v. Pattison*, 10 East 130; *Gibson v. Holden*, 115 Ill. 199. The covenant in the present case does not meet these requirements; the effect of a breach upon the land demised is dependent upon a collateral circumstance, namely, the election of the superior landlord to avail himself of the proviso for reëntry contained in the original lease.

LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — WORDS IMPUTING UNCHASTITY TO WOMAN. — The defendant used words imputing unchastity to the plaintiff, an unmarried woman. The plaintiff sued for slander without alleging or proving special damage. *Held*, that, although, the acts charged were not criminal, the action is maintainable. *Battles v. Tyson*, 110 N. W. Rep. 299 (Neb.).

The long-established rule of the common law refusing relief to a woman who has been charged with unchastity unless she can show special damage, has often been severely criticized. See *Lynch v. Knight*, 9 H. L. Cas. 577, 593. It is simply an arbitrary rule, unexplained even by the side-lights of history and indefensible on principle, for such a charge is infinitely more damaging to a woman than that of some comparatively slight offense for which the law provides punishment. The court in the present case is therefore justified in departing from established law, though few other courts have had the temerity to do so. *Cushing v. Hederman*, 117 Ia. 637; *Barnett v. Ward*, 36 Oh. St. 107; see *Smith v. Minor*, 1 N. J. L. 19. One of these jurisdictions has refused to give redress where a man is the subject of the charge. *Davis v. Brown*, 27 Oh. St. 326. That the common law rule is not satisfactory is shown by the fact that some states have changed the rule by statute. *Campbell v. Irving*, 146 Ind. 681, 683. In others the same result comes about from statutes making specific acts of unchastity criminal, so that the words necessarily charge with a crime. *Hacker v. Heiney*, 111 Wis. 318.

MORTGAGES — RIGHTS AND LIABILITIES OF PARTIES — APPLICATION OF INSURANCE TO MORTGAGE DEBT. — The complainant mortgagee petitioned for foreclosure for default in payment of interest. Part of the property mortgaged had been destroyed by fire, and the defendant contended that the proceeds of an insurance policy thereon, procured by the mortgagor for the benefit of the mortgagee, should have been applied to the payment of the interest as it fell due. Had this been done, nothing would have been due when the petition was brought. *Held*, that the petition be dismissed. *Thorp v. Croto*, 65 Atl. Rep. 562 (Vt.).

It has been held that the mortgagor cannot insist on the mortgagee's applying the proceeds of an insurance policy, taken out by the mortgagor for the mortgagee's benefit, to a mortgage debt not yet due. *Naquin v. Texas, etc., Ass'n*, 67 S. W. Rep. 85 (Tex.). It has also been held that the mortgagee cannot insist on such application. *Fergus v. Wilmarth*, 117 Ill. 542. After payments are due, however, there is some uncertainty in the language of the courts as to the exact manner in which proceeds of insurance should be applied. On the one hand are statements that they should be applied to the debt *pro tanto*. See *Fowley v. Palmer*, 5 Gray (Mass.) 549. And it has been said that such a fund should be treated as are rents and profits of the estate. See *Larrabee v. Lambert*, 32 Me. 97. On the other hand are statements that the proceeds should be held as a substitute for the property destroyed. See *Powers v. Insurance Co.*, 69 Vt. 494; *Gordon v. Ware Sav. Bank*, 115 Mass. 588. This last view seems sound. Since insurance represents destroyed property, it would seem that either the mortgagor or mortgagee might insist on its being used to restore the destroyed property or kept intact as a substitute therefor, instead of being exhausted in the payment of interest or instalments of principal. Cf. *Boutelle v. Minneapolis City*, 59 Minn. 493.

MUNICIPAL CORPORATIONS — FRANCHISES AND LICENSES — ESTOPPEL OF CITY TO DENY VALIDITY OF ORDINANCE. — A city by ordinance granted a lighting company the right to lay pipes in the streets. After several miles had been laid a bill was brought in the city's right to enjoin the company from laying more pipes and from maintaining those already laid, on the ground that the ordinance was *ultra vires*. *Held*, that the city is estopped to deny the validity of the ordinance. *Darby v. Norwood*, 52 Oh. L. Bul. 253 (Oh., C. P. Hamilton Co., Dec., 1906). See NOTES, p. 564.

POLICE POWER — REGULATION OF BUSINESS AND OCCUPATIONS — RESTRICTIONS ON SALE OF WHOLE STOCK BY RETAIL DEALERS. — A statute provided that sales by retail dealers of their entire stock should be void against creditors, unless, seven days before sale, notice of the intended transaction and its terms should be recorded in the town clerk's office. *Held*, that the statute is constitutional. *Young v. Lemieux*, 65 Atl. Rep. 436 (Conn.).

Prima facie the statute infringes two constitutional provisions. Restrictions on contracting are a deprivation of liberty. Also, retailers as a class are denied equal protection of the laws. But the police power may be a justification. Protection of citizens from fraud is one of its proper objects. *Powell v. Pennsylvania*, 127 U. S. 678. And retailers often contract debts, sell out secretly, and disappear, leaving creditors remediless. Furthermore, a retail business offers especial opportunities to sell quickly and secretly. This statute allows creditors to secure themselves. It has not the burdensome requirement of sending inventories to each creditor, found in similar statutes held unconstitutional. *Wright v. Hart*, 182 N. Y. 330; *Miller v. Crawford*, 70 Oh. St. 207. But it presses the necessity of making preferably private agreements public far beyond those sustained statutes requiring only notice to creditors. *Squire v. Tellier*, 185 Mass. 18; *Neas v. Borchers*, 109 Tenn. 398. Whether such a statute is a reasonable, and therefore a valid, exercise of the police power is for the business judgment. But it is strange that the earliest American statute of this sort was passed in 1896, if the measure is as essential as claimed to protect creditors of a class which has existed always.

POLICE POWER — REGULATION OF PROPERTY AND USE THEREOF — FLAG LAWS. — A Nebraska statute forbade the use of the American flag for advertising purposes. The defendant was indicted for so using it on a bottle of beer. He pleaded that the statute was unconstitutional under the Fourteenth Amendment. *Held*, that it is valid. *Halter v. Nebraska*, U. S. Sup. Ct., March 4, 1907.

This affirms the decision of the state court, criticized in 19 HARV. L. REV. 532.

POWERS — DEFECTIVE EXECUTION — TIME OF EXECUTION. — The plaintiff's husband was entitled by his father's will to certain real estate for life with remainders over, with power to appoint by way of jointure to any wife he might marry. Before the testator died, the plaintiff's husband, by a settlement made in consideration of his intended marriage with the plaintiff, covenanted to exercise this power in her favor. The marriage took place, and on the testator's death the plaintiff's husband came into possession of the real estate, but died without appointing. *Held*, that the covenant was a defective execution of the power, valid in equity, and that the plaintiff is entitled to her jointure. *Charlton v. Charlton*, [1906] 2 Ch. 523. See NOTES, p. 560.

POWERS — POWER OF SALE — VALIDITY OF MORTGAGES. — Land was conveyed in trust for A for life, remainder in trust for the plaintiffs, with power in A to convey the fee absolutely and to re-invest the proceeds on similar trusts. A executed a purchase-money mortgage to the settlor and subsequently a second mortgage to the assignees of the first. *Held*, that the plaintiffs are bound by the first mortgage but not by the second, and that therefore a foreclosure sale under the second alone transferred only an equitable life estate. *Stump v. Warfield*, 65 Atl. Rep. 346 (Md.). See NOTES, p. 568.

PUBLIC OFFICERS — NATURE OF PUBLIC OFFICE — DE FACTO OFFICES. — At the time when a motion for a new trial was granted, the session of the court authorized by a valid law had come to an end. There was no authority for the court's activity except under a law subsequently declared unconstitutional. *Held*, that the grant of the motion for a new trial is void. *Norwood v. Louisville & Nashville Ry. Co.*, 42 So. Rep. 683 (Ala.).

The doctrine of *de facto* officers is well established. It is generally rested upon the policy of protecting innocent third parties dealing with the *de facto* officer. Upon the question whether or not there can be a *de facto* office, authority is much less abundant. The United States Supreme Court, representing the decided weight of authority, has denied the possibility. *Norton v. Shelby County*, 118 U. S. 425; *Flaucher v. Camden*, 56 N. J. L. 244. It has been strongly urged, on the other hand, that the policy underlying the doctrine of *de facto* officers would often require a doctrine of *de facto* offices, particularly where a statute not yet declared unconstitutional gives color of right. *Burt v. Winona & St. Peter R. R. Co.*, 31 Minn. 472; see *Donough v. Dewey*, 82 Mich. 309. When the acts of officials of a *de facto* municipal corporation are concerned, the problem may be treated as involving merely a question of *de facto* corporations. *Riley v. Garfield Township*, 58 Kan. 299. It has also been treated, however, as involving the status of a *de facto* officer in a *de facto* office. *State v. Gardner*, 54 Oh. St. 24. If the doctrine of *de facto* offices is ever to be invoked, the present case seems a proper one for its application, for there was here a statute not yet declared unconstitutional, and merely temporary non-existence of the office.

QUASI-CONTRACTS — MONEY PAID UNDER DURESS OR COMPULSION — VOLUNTARY OVERPAYMENT TO AVOID BUSINESS LOSS. — The plaintiff owed the defendant \$880, but the latter, under a reasonable interpretation of the contract, claimed \$1500. The plaintiff paid the latter amount under protest in order, by freeing his property from the defendant's lien, to secure an immediate loan, which would probably save him from bankruptcy. He then sued to recover the overpayment. *Held*, that he can recover. *Rowland v. Watson*, 88 Pac. Rep. 495 (Cal.).

In general, payments made freely and with full knowledge of the facts cannot be recovered. The conduct of a creditor in retaining an overpayment is clearly unconscionable, but there is strong public policy against permitting parties, who have once settled their dispute, afterward to ask a court to pass upon it. However, if money is paid because of duress of person, public policy favors a recovery. *Cadaval v. Collins*, 4 A. & E. 858. The same is true if the party receiving the money has any other power over his debtor. It is on this principle that recovery of money paid as usurious interest is allowed. *Bosanquett v. Dashwood*, Cas. t. Talb. 37. The language of many cases would indicate that the party paying cannot recover unless there is direct coercion by the one receiving the payment. See *Lehigh Co. v. Brown*, 100 Pa. St. 338. But it is the better view that any necessity which urges the debtor to make payment before his rights can be determined in a court of law, will take the case out of the rule of public policy. *Joannin v. Ogilvie*, 49 Minn. 564; *Astley v. Reynolds*, 2 Str. 915. The principal case illustrates the liberal tendency of the modern decisions. See *West Virginia Co. v. Sweetzer*, 25 W. Va. 434.

SURETYSHIP — DEFENSE OF ALTERATION OF CONTRACT — FAILURE OF PRINCIPAL TO SIGN BOND. — A bond, purporting to be the obligation of the treasurer of a school district as principal and of others as sureties, was executed by the sureties alone in ignorance that the principal had not signed. *Held*, that the sureties are not bound. *School District No. 80 v. Lapping*, 110 N. W. Rep. 849 (Minn.).

In cases where a principal is otherwise bound to perform the act guaranteed, the liability of a surety in an obligation purporting to be also the obligation of the principal, but not signed by him, is a subject of considerable conflict. The weight of authority holds the surety liable on the ground that the surety is in no way affected by the already bound principal's failure to sign. *Trustees of Schools*

v. *Sheik*, 119 Ill. 579; *Cockrill v. Davie*, 14 Mont. 131. Other decisions hold the surety relieved because the instrument is incomplete on its face, and the surety's liability should not be extended beyond his literal undertaking. *Russell v. Annable*, 109 Mass. 72. A distinction is sometimes taken between joint obligations and joint and several obligations, the surety being held only on the latter. *Sacramento v. Dunlap*, 14 Cal. 421. Other decisions distinguish between ordinary sureties and those on the official bond of public officers, on the ground that a public officer is more directly liable independently of the suretyship bond. *State v. Bowman*, 10 Oh. 445. It would seem that where the surety can show no injury by reason of the absence of the principal's signature, he should be held liable. Cf. *Bollman v. Pasewalk*, 22 Neb. 761.

TAXATION — PROPERTY SUBJECT TO TAXATION — EASEMENTS. — The plaintiff was the owner of a right of way over a strip of land. The land was assessed only against the owner of the fee, and on non-payment of taxes actual notice was given the latter and an advertisement of sale was published for the statutory period. The property was then sold for taxes. The plaintiff claimed that the property should not have been exclusively assessed against the owner of the fee. *Held*, that the sale is valid. *Hill v. Williams*, 65 Atl. Rep. 413 (Md.).

A valid tax sale will give the purchaser a title free from all incumbrances. *Textor v. Shipley*, 86 Md. 424. The plaintiff's easement was therefore completely extinguished unless the sale was void. If the land was assessed against an improper person, it clearly could not be sold for the non-payment of such tax. *Whitney v. Thomas*, 23 N. Y. 281. The question, therefore, is simply whether the owner of the fee should pay the entire tax or whether it should be partly borne by the owner of the easement. The policy of the law seems to be to assess real estate against the person having the paramount title. *Willard v. Blount*, 11 Ired. (N. C.) 624. This would dispose of the present case. Authority goes even further and holds that incorporeal hereditaments are not taxable real estate. *Boreel v. City of New York*, 2 Sandf. (N. Y.) 552. Thus a water company's right to flood land is held not taxable. *Fall River v. County Commissioners*, 125 Mass. 567. Similarly a right to enter and cut timber has been held exempt both on the ground of its not being real estate and because to tax it might subject the land to double taxation. *Iron Works v. Cone*, 56 Vt. 603.

USURY — NATURE AND VALIDITY OF USURIOUS CONTRACT — APPLICATION OF FEDERAL STATUTE TO STATE BANK BUYING INSTRUMENT ORIGINALLY USURIOUS. — § 5198 of the U. S. Compiled Statutes 1901 provides that, though a national bank knowingly charges a usurious rate, the instrument shall not be void. N. Y. Laws 1837, c. 430, § 1, provided that all instruments charging a usurious rate should be void; but N. Y. Laws 1892, c. 689, § 55, provided that state banks should be subject to the same usury laws as national banks. A note was made by the defendant, at a usurious rate, to a payee not a bank. It was later bought at a legal rate and sued on by a state bank which knew of the usury. *Held*, that there can be recovery. *Schlesinger v. Lehmaier*, 102 N. Y. Supp. 630 (App. Div.).

The decision is based partly on the incongruity which would result if a bank could sue on a usurious instrument made to it as payee, which the statute allows, and yet not on one, of usurious inception between private parties, bought by it without usury. But this does not answer the objection that, by the general usury law of the state, no obligation existed for the bank to buy, the note being void from the start; whereas, if the bank is payee, the special statute creates an obligation. It is a sounder ground that a national bank can in no way be bound by the state usury laws, because such laws interfere with the operation of a governmental agency. *Farmer's, etc., Nat'l Bank v. Dearing*, 91 U. S. 29. To purchase negotiable paper, as well as to discount it, seems appropriate to a national bank's operation. *Smith v. Exchange Bank*, 26 Oh. St. 141; *contra*, *Lazear v. Nat'l Union Bank*, 52 Md. 78. Nor should notice of the usury prejudice, for under the combined statutes notice does not avoid the instrument if the bank is payee, where notice is certainly a graver objection than here. See *Schlesinger v. Kelly*, 99 N. Y. Supp. 1083.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

COMPENSATION FOR PROPERTY DESTROYED TO PREVENT SPREAD OF A CONFLAGRATION. — The destruction of buildings by explosives and bombardment to stop the advance of the fire at the San Francisco disaster raises the questions: (1) whether the owners have a claim for indemnity against the insurance companies under their contracts of insurance; and (2) whether there is an action against the municipality for contribution. These questions are systematically considered, and the authorities are exhaustively collected and synthesized in a recent article. *Compensation for Property Destroyed to Prevent Spread of a Conflagration*, by Henry C. Hall and John H. Wigmore, 1 Ill. L. Rev. 501 (March, 1907). In treating the question (1) of the liability of the insurer, Mr. Hall discusses (a) how far the ordinary provision of fire insurance policies, "for loss or damage by fire," includes a liability for property destroyed to prevent the spread of a fire, and (b) whether express exemption clauses against loss by explosion or by act of the city authorities negative indemnity. He concludes (a) that by "the elastic doctrine of 'proximate cause,'" the peril insured against need simply predominate among other causes which may be more direct as to time and place; and that, therefore, losses resulting from such preventive measures as are here in question are "losses by fire" for which the insurer is liable. And (b) on the same ground of insurance against the proximate cause of the loss, he inclines to hold the insurer liable for such losses even when the insurance contract contains exemption clauses. In both these cases a confusing rule of "proximate cause" has been established, under the influence of the practice¹ of construing contracts very harshly against the insurer, and by the desire to indemnify, not only for losses directly caused by fire, but for damages² resulting from *bona fide* attempts to extinguish it or to save property from burning. In applying this rule of proximate cause courts do not hesitate to find the causal relation between the fire and the loss, when the fire has given a thief³ — an independent and intervening agent — the opportunity to steal the property insured. Yet courts refuse to regard as proximate results losses that come from a causal series physically perfect, as when windows⁴ are broken by the concussion following an explosion caused by fire. A rule of causation that includes voluntary acts of human agents, but excludes ordinary physical effects of the peril insured against, seems objectionable.

"Loss or damage by fire" may mean simply losses caused by the process of burning and the direct physical results,⁵ or it may include, in addition to results causally produced, certain losses occasioned by the peril of the "impending conflagration." Under the narrower rule, even with a limitation of liability to losses caused by burning, the insured would recover for property destroyed by the city, if the explosive used in destroying the property happened to be combustible,⁶ like gunpowder. In such a case the fire causing the loss is the fire kindled to set off the explosive and the resulting combustion, not the fire raging in the neighborhood. The leading case⁷ determining the liability of the insurer when explosives are used depends on this conception. But, as combustible explosives are not necessarily the means of destruction, the courts have sought a broader principle. They say "loss or damage by fire" should also include damages resulting from *bona fide* attempts⁸ to extinguish the fire and to save

¹ Nat'l Bank v. Ins. Co., 95 U. S. 673.

² Greenwald v. Ins. Co., 3 Phila. (Pa.) 323.

³ Tilton v. Hamilton Fire Ins. Co., 1 Bosw. (U. S.) 367.

⁴ Everett v. The London Assurance, 19 C. B. (N. S.) 126.

⁵ Lynn, etc., Co. v. Meriden, etc., Co., 158 Mass. 570.

⁶ Scripture v. Lowell, etc., Co., 10 Cush. (Mass.) 356.

⁷ City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367.

⁸ White v. Republic Fire Ins. Co., 57 Me. 91.

the imperilled property. However desirable this broad interpretation may be, it includes voluntary acts of human beings acting, perhaps, under stress or duty, but still acting as free agents. It must depend, therefore, not on any theory of causation, but on a construction of the contract. This construction is possible because the insured is impliedly and often expressly¹ under the obligation of making all reasonable exertions to extinguish the fire and prevent avoidable consequences.² To extend such construction, however, to cover the case of property destroyed to prevent the spread of fire is far more difficult, for then the losses are incurred not for the benefit of the particular property insured.³ Whether or not this result⁴ is fair to the insurer, it is submitted that it can be reached consistently only by the broadest interpretation of the contract of insurance and not by the artificial rule of proximate cause.

Furthermore, under this theory the clauses—generally adopted and in the standard policies—excepting loss by explosion and loss caused by order of the city, etc., become very material. In spite of these clauses it is generally held,⁵ at any rate when an explosion follows an “accidental fire,” that the insurance company is not exempt from liability. In the same way the courts would probably disregard the second exception in case of property destroyed by the city to stop a conflagration. But, if the contract be interpreted, it would seem that these exceptions should be effective.⁶

The alternative question (2) of the right of the owner to recover from the municipality has almost always, in the absence of statute, been answered in the negative. The courts have based this result most soundly on the ground that the municipal corporation is strictly limited⁷ by its charter, and they have only suggested the possibility of a quasi-contractual right. This right Mr. Wigmore strongly advocates. The most cogent analogy advanced in favor of his theory seems to be the doctrine of general average⁸ in maritime law, under which every person whose property is preserved at the expense of another's is liable to contribution in proportion to the value of his share of the cargo. But the language of the only case⁹ applying the suggested quasi-contractual doctrine under circumstances like the present, is “that those for whose supposed benefit the sacrifice is made should be liable.” A “supposed benefit” seems too conjectural to found an action in implied *assumpsit*, and it is equally conjectural whether the city as a whole enjoyed the “supposed benefit.” As the certainty of the benefit and of the party benefited, which are fundamentally requisite in the law of general average, are both lacking here, no action for quasi-contractual contribution should lie against the municipality. Instead, the remedy would seem to be legislation, in view of which the writers append the draft of an all-embracing statute.

CONDITIONS IN CONTRACTS.—The influence of the teachings of Professor Langdell and Professor Williston on the subject of conditions in contracts is evidenced by a recent article by Mr. George P. Costigan, Jr., who gives a summary of the questions. *Conditions in Contracts*, 7 Colum. L. Rev. 151 (March, 1907). The writer first defines the three classes of conditions,—express conditions, those implied in fact, and those implied in law. He indicates pointedly that while the first two classes are practically alike, the third differs greatly

¹ Mass. Rev. L. 1902, c. 118, § 60.

² Brady v. N. W. Ins. Co., 11 Mich. 425.

³ Cohn v. Nat'l Ins. Co., 96 Mo. App. 315, 319.

⁴ The Metropolitan Fire Brigade Act, 28 and 29 Vict., c. 90, § 12, provides that damage occasioned by the Fire Brigade in “pulling down” buildings to put an end to a fire “shall be deemed to be damage by fire within the meaning of any policy against fire.”

⁵ Washburn v. Ins. Co., 2 Fed. Rep. 304.

⁶ Hustace v. Phoenix Ins. Co., 175 N. Y. 292.

⁷ Field v. City of Des Moines, 39 Ia. 575.

⁸ See Star of Hope, 9 Wall. (U. S.) 203, 228.

⁹ Bishop v. Mayor, 7 Ga. 200.

from them both, in that it rests not upon the intent of the parties, but, without regard to any intent, is read into the contract to meet the ends of justice.¹ The article proceeds with a short history of the subject from the time when the promises in a contract were regarded as independent, until, under Lord Mansfield,² they became so dependent that the party suing was generally required to show performance or offer to perform to put the other party in default. The writer then considers the classes of conditions more specifically.

In these details he fails to trace clearly the principles stated earlier in his article. He does not point out that the materiality of a breach, depending on the principle of a condition implied in law, should be decided on grounds of justice rather than on the intention of the party to repudiate.³ Nor does he show that the reason why a breach *in limine* is more likely to be material than a breach after part performance is because a forfeiture is more likely to result in the latter case.⁴ There is considerable discussion regarding a breach which "goes to the essence," but this phrase does not carry us very far when we are looking for a basic principle. The writer shows by his own wording how the term "implied condition" is likely to mislead,⁵ when, in discussing the question of anticipatory breach, he says that "it is an implied condition of a contract that the promisor shall not announce beforehand that he is not going to perform." He would seem to mean by this statement that the reason for giving a defense rests upon the court's interpretation of the intent of the parties. In the very next statement, however, he shows that the defense is really equitable when he adds that the party may withdraw the repudiation at any time before it has been acted upon. The article would have been more valuable if it had brought out more clearly this fundamental distinction between the different conditions, and devoted less space to the general summary.

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- ALIEN CONTRACT LABOR LAW, THE. *Samuel P. Orth*. Reviewing the growth of legislation and its interpretation by the courts. 22 Pol. Sci. Quar. 49.
- AMENDMENT OF STATE CONSTITUTIONS. *James Wilford Garner*. A strong argument for more widely procedure, founded on a careful review of the constitutional provisions and observation of their workings. 1 Am. Pol. Sci. Rev. 213.
- APPLICABILITY OF THE RULE RES IPSA LOQUITUR AS BETWEEN MASTER AND SERVANT. *Anon.* 13 Case & Comment 118. See 20 HARV. L. REV. 228.
- CAN THE UNITED STATES BY TREATY CONFER ON JAPANESE RESIDENTS IN CALIFORNIA THE RIGHT TO ATTEND THE PUBLIC SCHOOLS? *William Draper Lewis*. Answering this question in the affirmative. 55 Am. L. Reg. 73. See 20 HARV. L. REV. 337.
- COMPENSATION FOR PROPERTY DESTROYED TO STOP THE SPREAD OF A CONFLAGRATION. *Henry C. Hall and John H. Wigmore*. 1 Ill. L. Rev. 501. See *supra*.
- CONDITIONS IN CONTRACTS. *Geo. P. Costigan, Jr.* 7 Colum. L. Rev. 151. See *supra*.
- CONSTITUTIONAL POSITION OF THE HOUSE OF LORDS, THE. *G. Glover Alexander*. Considering its position at present as opposed politically to the House of Commons, and the possibilities of its reform. 32 L. Mag. & Rev. 129.
- DELAY AS A DEFENSE TO SPECIFIC PERFORMANCE. *Sarat Chandra Chaudhri*. 4 Allahabad L. J. 55.
- ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS, THE. *Aula Gentium*. 32 L. Mag. & Rev. 155.
- EQUITABLE OWNERSHIP. *Anon.* Pointing out the tendency to treat certain equitable rights not as mere choses in action but as rights *in rem*. 122 L. T. 312.

¹ See 19 HARV. L. REV. 462.

² *Kingston v. Preston*, 2 Dougl. 689.

³ *Freeth v. Burr*, L. R. 9 C. P. 208; see 14 HARV. L. REV. 317, 323.

⁴ Cf. *Boone v. Eyre*, 1 H. Bl. 273 n., where a defense was refused presumably because a forfeiture would result, and *Duke of St. Albans v. Shore*, 1 H. Bl. 270, where a defense was given under very similar facts, except that there was no forfeiture.

⁵ See 14 HARV. L. REV. 421, 424.

- IMPRISONMENT OF CRIMINAL CORPORATIONS, THE. *Donald R. Richberg*. Replying to objections recently expressed against the theory, that, as a penalty for crimes of corporations, the state should take over the management of the corporate business for a certain time and reserve its profits wholly to the use of the state. 19 *Green Bag* 156.
- JURISDICTION AND PRACTICE UNDER THE ACT OF CONGRESS, APPROVED JUNE 11TH, 1906, RELATING TO THE LIABILITY OF COMMON CARRIERS TO THEIR EMPLOYEES, THE. *John T. Harris*. 12 *Va. L. Reg.* 866.
- LAW CHANGES PROPOSED. *A. U. M.* Suggesting federal divorce regulations within the present powers of Congress. 68 *Alb. L. J.* 383.
- LEGAL ASPECTS OF THE SUBMARINE CABLE AND WIRELESS TELEGRAPH IN WAR. *Charles L. Nordon*. Advocating an international rule to determine under what circumstances cables may be cut. 32 *L. Mag. & Rev.* 166.
- LONG-HAUL LEGISLATION AND LAW-WRITING, BEING REFLECTIONS UPON A NEW WORK ON RAILROAD RATE REGULATION. *Charles E. Grinnell*. Criticizing The Law of Railroad Rate Regulation, by Profs. J. H. Beale, Jr., and Bruce Wyman. 41 *Am. L. Rev.* 1. See 20 *HARV. L. REV.* 340.
- MARRIAGE IN ROMAN LAW. *Emile Stocquart*. 16 *Yale L. J.* 393.
- PRESUMPTIONS AS TO POSSIBILITY OF ISSUE. *Anon.* Discussing under what circumstances the court will disregard the possibility of issue. 122 *L. T.* 405.
- TREATY-MAKING POWER AND THE RESERVED SOVEREIGNTY OF THE STATES, THE. *Arthur K. Kuhn*. Contending that where a state law and a treaty conflict the former must give way. 7 *Colum. L. Rev.* 174.

II. BOOK REVIEWS.

THE FEDERAL POWER OVER CARRIERS AND CORPORATIONS. By E. Parmelee Prentice. New York: The Macmillan Company. 1907. pp. xi, 244. 8vo.

In April, 1800, Thomas Jefferson wrote to Edward Livingston:

"The House of Representatives sent us yesterday a bill to work Roosewell's copper mines in New Jersey. I do not know whether it is understood that the Legislature of Jersey was incompetent to do this, or merely that we have concurrent legislation under the sweeping clause. Congress are authorized to defend the nation. Ships are necessary to defense; copper is necessary for ships; mines necessary for copper; a company necessary to work mines; and who can doubt this reasoning who ever played at 'This is the House that Jack Built'?"

Plainly "men may construe things after their fashion clean from the purpose of the things themselves."

To meet such perverted methods is the purpose of Mr. Prentice's book. The work now put forward in small compass is part of the results of twenty years of study devoted by a trained constitutional lawyer to the question, how far the Congress may constitutionally legislate in regard to corporations and common carriers of goods and persons. These questions belong to the domain of constitutional history. In following this development legal decisions tell but part of the story. The practice of states and of Congress must also be considered. Undisputed constructions are not often involved in litigations, and may appear only by study of constitutional practice, which for this reason is sometimes more important than decisions of the highest court. In this history the purpose of state and federal statutes and the contemporary significance of legal decisions have been exhaustively studied, and the results clearly, logically, and concisely stated. Much new material is made available, and important decisions are shown to have a meaning quite different from that which a modern reader would receive from the reports alone.

This is especially true of the great case of *Gibbons v. Ogden*. Marshall's broad references to a federal power to regulate commerce which was plenary and supreme, relate, Mr. Prentice says, only to coasting trade and the federal

revenue. His conclusion is supported by a long and almost forgotten history of interstate transportation under state law. Federal power over commerce did not in the beginning extend over land transportation.

If, after reading this striking history, we turn again to Marshall's decision, his statement, that the sense of the nation as to the power of Congress within the states "is unequivocally manifested by the provisions made in the laws for transporting goods by land between Boston and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore" (9 Wheat. 196), will be read and re-read with wholesome amazement. We should expect to find that there were then federal statutes which, in the present meaning of the phrase, could be said to regulate land transportation. There were no such statutes. The reference is to laws allowing a drawback of customs duties upon exportation of imported goods (*e. g.*, Act of March 2, 1799, § 79). This simple test shows how necessary, for any adequate comprehension of constitutional development, is just such a careful study and analysis of constitutional history as Mr. Prentice has made.

Following the discussion of the constitutional convention, the case of *Gibbons v. Ogden*, and the early history defining federal and state powers, Mr. Prentice traces the course of subsequent history, the influence of slavery, of railroads, and the unforeseen and hardly traceable course of development by which land carriers have come within federal jurisdiction. This jurisdiction was not established at the time of the "Windom Report" in 1874, and the argument of that report for extension of federal power over land transportation has not prevailed. The existing power comes from sources not then thought of, and is of a different nature, and subject to other restrictions, than would have been the case had the power been, as the report argued, within the original scope of the commerce clause.

The concluding chapters of the book contain a review of the Sherman Act with reference to the field for its operation as fixed by the constitutional interpretation of over a hundred years, together with a full discussion of the decisions, state and federal, applying the provisions of the statute.

In this connection *Loewe v. Lawlor* (148 Fed. Rep. 924, Dist. Conn.), reported since Mr. Prentice's book appeared, deserves attention. This case presents in a new aspect the rule of *Gibbs v. McNeeley*, which Mr. Prentice so strongly criticizes (pp. 198-204, 215). Hitherto the Supreme Court has placed the same construction upon the Sherman Act whether applied to combinations of capital or of laborers. Guilt or innocence of the charge of conspiracy has been determined by the character of the defendants' design and of the acts done for its accomplishment, not by the defendants' employment or walk in life. The Constitution, too, has been consistently interpreted. There has been no varying interpretation by which federal jurisdiction is at times broadened to include some combinations and at times narrowed to exclude other combinations. In *Gibbs v. McNeeley* the Circuit Court of Appeals, Ninth Circuit, departed from previous interpretations by extending the operation of the Sherman Act to cover combinations of corporations which had formerly been within state control alone, a decision which has been followed in several cases. This extended jurisdiction the court in *Loewe v. Lawlor* now refuses to recognize in the case of labor unions. Constructions which lead to these contradictions are hardly less than the repeal of law. It is to be hoped that long-recognized principles may soon again prevail. Of this, perhaps, *Pocahontas Coke Company v. Powhattan, etc., Co.* (56 S. E. Rep. 264) and other cases of similar character, as well as Mr. Jenkins' able report on *Woman and Child Labor* (H. R. 7304, 59th Cong., 2nd Sess.), submitted on February 6, 1907, may perhaps give some sign.

The book is valuable for lawyers,—even for that much-trying brother, the "practicing" lawyer. But it has a wider scope. It should be put—forced, if need be—into the hands of every Senator and Member of Congress.

R. W.

ACT OF STATE IN ENGLISH LAW. By W. Harrison Moore. London: John Murray. 1906. pp. xi, 178. 8vo.

When we learn on the first page of the introduction that "in modern times 'matter of state' connotes that the relation to which it applies is not one of law, or at any rate of municipal law," we expect to be led through fields of theoretical discussion of abstract points, never to be brought out in courts of law. But some one hundred and sixty cases, many of them arising on questions of the annexation of territory and the peculiar nature of our states as independent sovereignties, have given the author a considerable framework whereon to build. A chapter is devoted to the difficult subject of the status of martial law in our system of jurisprudence. After considering the various theories and the law as presented by the cases, Mr. Moore suggests as a solution the view taken in *Ex parte Marais* ([1902] A. C. 109) that "war exists not merely where the civil courts have been overthrown, but also wherever the circumstances of the war have made the military authority predominant in fact, so that all other organs are plainly subordinate to them." It then remains for a civil court to determine whether war exists at a given place by making an inquiry into the actual exigencies of the military situation, but without considering any question of justifying by necessity the particular act complained of. Under this view civil society is not dissolved even temporarily, but a military organization is superimposed upon it. The question of how far the adoption by his sovereign of the act of an alien, otherwise a crime against the law of another country, will yield immunity to that subject is interestingly considered. The difficulty lies in the fact that adoption by the foreign sovereign should make it an "act of state" not consuable in municipal courts, but a matter to be settled through diplomatic channels, whereas such a view, if admitted to its full extent, would have the effect of surrendering to such sovereign jurisdiction over another soil. The widespread consequences of *Quinn v. Leatham* ([1901] A. C. 495) are shown by the suggestion, apart from the question of act of state, that since an alien has liberty, though no right, to enter British territory, by that case any effectual prohibition would undoubtedly be an actionable wrong. The discussion of the rights and obligations of an individual under a treaty is also particularly pertinent.

Where there is an extended discussion of the principle of a case it is perhaps unfortunate that the facts are not always stated together with the *ratio decidendi*, so that the reader may form his own conclusion as to the principle to be deduced. The carelessness of the proof-reader at one or two points is painfully evident, and it would be a convenience, where reference is made to a case already taken up, to have the page on which it is discussed mentioned. These minor blemishes cannot detract from the interest and intrinsic value of a volume which shows the result of much thought and research upon a comparatively undiscussed subject.

M. F.

OUTLINES OF CRIMINAL LAW. By Courtney S. Kenny. Revised and adapted for American Scholars by James H. Webb. New York: The Macmillan Company. 1907. pp. xxi, 404. 8vo.

In preparing this edition two classes of readers have been kept in mind by the editor: first, the student of law; secondly, the general reader and students of subjects wherein a general knowledge of criminal law may be of advantage. The original English edition contained chapters on the English courts and procedure, the problems of punishment and coming changes in the criminal law. These have been omitted from the present edition.

Considering the work from the point of view of the general reader or student who is not engaged in a technical study of the law, the work deserves commendation. The lucidity of expression, the illustration of abstract principles by interesting cases, the discussions of the nature of a crime and the purpose of punishment, make the book attractive and very readable.

From the point of view of its adaptation to the use of the student of law in an American law school, the work, admitting its above-mentioned merits, is, perhaps, more open to adverse criticism. The proportion of American to English

cases is somewhat less than one to two. This is for the most part unobjectionable, for if the law is clear it may perhaps as well be illustrated by English as by American decisions. It would seem, however, questionable whether the student should not, on so important a point as the question of when possession passes in larceny when the transfer is under a mutual mistake (p. 206), where the law is not yet clear, have had his attention directed to the American decisions. So, the proposition that "a conviction could probably be obtained for an attempt to incite, or an attempt to conspire" (p. 75), makes no reference to either English or American decisions. So, in the question of the necessity of retreat in the case of homicide in self-defense (p. 95), where the American decisions are in decided conflict, there is no reference either to them or to the magazine articles on the point. In one instance a citation has been made of the decision of a lower court (p. 75, *People v. Gardner*, 73 Hun (N. Y.) 66), overlooking the fact that the case was reversed on appeal (*People v. Gardner*, 144 N. Y. 119).

Taking the work by the large, however, for what it is, an elementary treatise, it is good. The American cases that are cited are chosen with discrimination, the statements as to American law are accurate, and the additions to the text skillfully made.

H. A. B.

THE PRISONER AT THE BAR. By Arthur Train. New York: Charles Scribner's Sons. 1906. pp. xiv, 349. 8vo.

In this book the author presents the workings of the machinery of criminal procedure in New York City. He handles, however, questions and conditions that are sufficiently general to make the book's appeal more than local. His experience as an assistant district attorney in New York County especially fits him for his task, and puts at his command a plentiful supply of interesting anecdotes, enabling him to drive home his points clearly and forcibly. The book is written in a popular style for the general public. Mr. Train has no pet theories to exploit, nor a thesis to prove: his aim, as he points out, is to give information on a subject about which the average man is curiously ignorant, and still more curiously unconscious of the extent of his ignorance. Some sane philosophizing and a reasonable amount of salutary criticism accompany his exposition, and serve to point out fairly the strongholds, the weaknesses, and the needed reforms in our present system of criminal procedure.

REGULATION OF COMMERCE UNDER THE FEDERAL CONSTITUTION. By Thomas H. Calvert. Northport, N. Y.: Edward Thompson Company. 1907. pp. xiv, 380. 8vo.

A TREATISE ON THE LAW OF TAXATION BY SPECIAL ASSESSMENTS. By Charles H. Hamilton. Chicago: George I. Jones. 1907. pp. lxxxv, 937. 8vo.

POWERS OF THE AMERICAN PEOPLE, CONGRESS, PRESIDENT AND COURTS, ACCORDING TO EVOLUTION OF CONSTITUTIONAL. By Masuji Miyakawa. Washington: The Wilkins-Sheiry Co. 1906. pp. xiv, 260.

THE GOVERNMENT OF INDIA. By Sir Courtenay Ilbert. Second edition. Oxford: At the Clarendon Press. London and New York: Henry Frowde. 1907. pp. xxxii, 408. 8vo.

A SHORT ACCOUNT OF THE LAND REVENUE AND ITS ADMINISTRATION IN BRITISH INDIA, with a Sketch of the Land Tenures. By B. H. Baden-Powell. Second edition, revised by T. W. Holderness. Oxford: At the Clarendon Press. 1907. pp. vi, 254. 12mo.

COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA. By Thomas White. Philadelphia: T. & J. W. Johnson Co. 1907. pp. xxvii, 618. 8vo.

THE FEDERAL POWER OVER CARRIERS AND CORPORATIONS. By E. Parmelee Prentice. New York: The Macmillan Company. 1907. pp. xi, 244. 8vo.

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THE SEPARATE ESTATES OF NON-BANKRUPT PARTNERS IN THE BANKRUPTCY OF A PARTNERSHIP UNDER THE BANKRUPT ACT OF 1898.¹

Dedicated to Professor Langdell.

THE federal courts have almost unanimously held that under the Bankrupt Act of 1898 a partnership is to be treated as an entity. This is something wholly new. Under all prior acts, English and American, a partnership could be put into bankruptcy only by adjudicating all its members bankrupts. Courts of equity and bankruptcy courts have indeed often been driven by the necessity of the case to deal with the firm as an entity, and they have also frequently described the firm as an entity.² The same court that declares that the firm as an entity cannot be adjudged bankrupt unless all the partners are bankrupt, will, after the adjudication of its partners as bankrupt, proceed to decide questions on the theory that the firm is a legal person. But as courts of law are not consistent in denying the personality of the firm, so courts of equity are not consistent in admitting it. The very same court will at one time deal with the firm as a person, and at another time

¹ In the notes upon the law of Continental countries the *société en nom collectif* or *Offene Handelsgesellschaft* is taken as the equivalent of the English and American partnership or firm. The *société en commandite* or *Kommanditgesellschaft*, the counterpart of our limited partnership, is for the most part subject to the same rules as the *société en nom collectif* except as regards the special partners (*commanditaires* or *Kommanditisten*), who risk only their subscribed capital.

² See for a collection of cases an admirable article on *The Firm as a Legal Person*, 57 Cent. L. J. 343.

assert that it is not an entity. So far, however, as concerns the question of adjudging the firm bankrupt as a firm, there has been no difference of opinion. In the case of *In re Beauchamp Brothers*¹ Lord Esher said, "You cannot adjudicate the abstract thing called 'a firm' bankrupt. You cannot make a firm bankrupt unless you can make the members of the firm bankrupt." It was, therefore, not surprising that with all the authority, statutory and judicial, to the contrary, the first court that had occasion to consider the question of the nature of a partnership under the Bankrupt Act of 1898 should have been somewhat puzzled.² Section 5*a* of that Act provides that "a partnership during the continuation of the partnership business, or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt." Section 1 (19) provides that "'persons' shall include corporations, except where otherwise specified, and officers, partnerships," etc. With some hesitation the court held that these two sections authorized the adjudication as bankrupts of a firm and one of its members who had committed an act of bankruptcy, which was also an act of bankruptcy of the firm, although the other member could not be adjudged a bankrupt because he had committed no act of bankruptcy. The Circuit Court of Appeals affirmed this judgment,³ and the precedent thus set has been followed in all jurisdictions but one, to be hereafter mentioned.

This construction of the Bankrupt Act naturally led to decisions that the firm might be adjudged bankrupt when no partner was or could be made a bankrupt,⁴ and also that all the partners might be adjudged bankrupt without adjudging the firm a bankrupt.⁵ But the District Court of Massachusetts has found insuperable obstacles in the way of construing the Act so as to deal with the firm as an entity.⁶ This court had found no difficulty in holding that where one of the partners is a minor, an adjudication can be made against the adult partner and against the firm.⁷ But where one partner filed a petition to bring the firm and his co-partner into bankruptcy, it was held that the co-partner might set up the

¹ [1894] 1 Q. B. 1, 5.

² *Chemical Bank v. Meyer*, 92 Fed. Rep. 896.

³ *In re Meyer*, 98 Fed. Rep. 976.

⁴ *In re Stokes*, 106 Fed. Rep. 312; *In re Meyer*, 98 Fed. Rep. 976, 979 (*semble*).

⁵ *In re Mercur*, 116 Fed. Rep. 655; S. C. 122 Fed. Rep. 384; *Ludowici Roofing Co. v. Penn. Institute*, 116 Fed. Rep. 661.

⁶ *In re Forbes*, 128 Fed. Rep. 137.

⁷ *In re Dunnigan*, 95 Fed. Rep. 428.

defense that he was solvent, because an adjudication against all the partners, it was said, is essential to one against the firm, and that on the issue of solvency the co-partner is entitled to a trial by jury. The court arrived at the result by finding that certain parts of Section 5 other than those already quoted were not reconcilable with the theory of an entity. It must be admitted that all the provisions of Section 5 are not wholly consistent with the idea of the firm as an entity. Clause *h* of Section 5¹ is somewhat ambiguous.

The District Court of Massachusetts arrives at one conclusion as to its effect upon the present question, while the District Court of the Eastern District of Pennsylvania,² and the Circuit Court of Appeals of the Third Circuit affirming the judgment,³ reach the opposite conclusion. Some other clauses of the section were also relied upon by the District Court of Massachusetts, which do not seem to the writer, however, to stand in the way of holding that Congress intended to treat the firm as an entity for the purposes of bankruptcy. But the possibility of finding such apparent contradictions between different clauses of the section, as well as the re-enactment by Section 5 *f* of the old rule of distribution of the partnership and individual estates, indicates that the scheme of treatment of partnerships in bankruptcy was not fully thought out by the draftsman to its logical conclusion. The theory was a new thing, and the changes necessary to the application of the theory seem not to have been carefully considered. Liberality of construction would, however, seem to be desirable and to lead to approval of the result reached by the great majority of the federal courts.

But it is not the purpose of this article to discuss the question upon which the indicated difference of opinion has arisen, but assuming the firm to be an entity under the Bankrupt Act to consider the question of the treatment of the firm and individual estates where the firm alone has been made a bankrupt. The rule of distribution both in England and in America when all the partners are in bankruptcy, greatly criticized by the courts but

¹ "In the event of one or more, but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by the consent of the partner, or partners, not adjudged bankrupt; but said partner, or partners, not adjudged bankrupt, shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner, or partners, adjudged bankrupt."

² *In re Mercur*, 116 Fed. Rep. 655.

³ *In re Mercur*, 122 Fed. Rep. 384.

grudgingly yielded to, apparently more to save trouble than for any other reason,¹ may be made to run like some jingle, "firm estate to firm creditors, separate estate to separate creditors, anything left over from either goes to the other." It is believed that this rule is to be found in no other country,² and it is to be regretted that Congress did not avail itself of the opportunity to enact a rule of distribution more scientific and more in accordance with the principle of partnership liability, whether the firm be regarded as an entity or not.³

¹ Thus does Sir Frederick Pollock paraphrase the language of Lord Blackburn in *Read v. Bailey*, 3 App. Cas. 102. Pollock, *Partnership*, 8 ed., 155, n. 4.

² In France, although the codes make no express provision, the majority opinion is that the firm creditors take the firm estate and compete with the separate creditors upon the separate estate for any unpaid portion of their claims. Troplong, *Droit Civ. Contr. de Société*, t. 2, nos 857-863; Sirey et Gilbert, *Codes Annotés*, Art. 1864, nos 18, 19; Sirey, *Code de Commerce*, Art. 18-19, nos 128, 129; Fremery, *Études de Droit Commercial*, 32-33, 372; Lyon-Caen et Renault, *Droit Commercial*, t. 8, n° 1190.

In Switzerland the Code Fédéral des Obligations, Art. 566, in express terms gives the firm estate to the firm creditors to the exclusion of the separate creditors, and Art. 568 permits the firm creditors to pursue the separate estate for any unpaid balance in competition with the separate creditors, if the firm estate is insufficient to pay the firm creditors in full.

In Scotland the firm creditors rank in full on the firm estate, to the exclusion of the separate creditors, and rank on the separate estates *pari passu* with the separate creditors for the unpaid balance. 2 Clark, *Partnership*, 753.

In Germany, Art. 733 of the Civil Code (*Bürgerlichesgesetzbuch*) devotes the firm property to the payment of firm debts, and Art. 212 of the Bankruptcy Law (*Konkursordnung*) permits the firm creditors to seek satisfaction from a partner's separate estate in bankruptcy *pari passu* with his separate creditors for any balance not paid by the firm estate in bankruptcy. Sarwey-Bossert, *Konkursordnung*, Vierte Auflage, 496-497. It is contended by Kohler, *Leitfaden deutschen Konkursrechts*, Zweite Auflage, 198-199, that the firm creditor may prove the full amount of his claim against the individual estate, receiving, however, of course, dividends only to the amount of the unpaid balance; but this view is not generally adopted (Sarwey-Bossert, 497, n. 3 b).

In Austria the firm creditor may prove the full amount of his claim against the separate estate. *Konkursordnung*, § 201; *Handelsgesetzbuch*, § 31; Kissling, *Oesterreichische Konkursordnung*, 295-296.

In Hungary the firm creditors are paid first from the firm assets, and come upon the separate estate for the deficiency. *Code de Commerce*, Art. 97; *Loi sur la Faillite*, Art. 251 (French translation by De la Grasserie).

³ In France it is almost universally agreed that a partnership is an entity, *une personne morale, un être moral*. Lyon-Caen et Renault, *Droit Commercial*, t. 2, nos 105-124. And the personality of the firm is expressly admitted in the Belgian *Loi sur les Sociétés* of May 18, 1873, Art. 2, where, after enumerating five kinds of commercial *sociétés*, one of which is the ordinary partnership, it is provided that "*chacune d'elles constitue une individualité juridique distincte de celle des associés.*"

The Commercial Codes of Italy, Art. 77 (French translation by Turrel), and of Roumania, Art. 78 (French translation by Bohl), read, "*À l'égard des tiers, les sociétés sus-énoncées sont des êtres collectifs distincts de la personne des associés.*" And the Com-

Our rule of distribution is totally at variance with the mercantile view of partnership.¹ But even upon the legal theory it cannot be justified. To give the firm estate to the firm creditors to the exclusion of the separate creditors is of itself a personification of the firm, since otherwise the property would simply belong to the members as joint tenants or tenants in common, and so be subject to the claims of their individual creditors as fully as any other property of the members.² And on the other hand, if the firm is but an association of individuals, the creditors of the firm are creditors on the joint obligations of those members, and as such have the same rights against the property of each member, including therein property held by them jointly with others, as have his individual creditors. If the rule which throws the firm creditors first upon the firm estate is put upon the ground that the firm is the principal and the members are sureties, this too is a recognition of the firm as a different person from the members. If the principle of marshalling be invoked to justify the rule of distribution, it is to be observed that the application of this principle is only conceivable on the assumption that the firm creditors have a right to resort to a fund which the individual creditors cannot

mercial Code of Spain, Art. 116 (French translation by Prudhomme), provides that "*La société commerciale une fois constituée possède la personnalité juridique pour tous ses acts et contrats.*"

In Scotland the firm "constitutes a *quasi persona* of which the members are agents and sureties — a principle which exactly realizes the notion of a firm entertained by mercantile men both in this country and in England" (1 Clark, Partnership, 31), and it may therefore be rendered bankrupt without any of its partners being either bankrupt or insolvent. 2 *ibid.* 750.

In Russia the Commercial Code makes no provision on the subject, but it is said that Russian jurisprudence recognizes the personality of the firm. Code de Commerce Russe, 20-21 (French translation by Tchernow).

In Louisiana the partnership is an entity, "a moral being distinct from the persons who compose it"; "a civil person which has its peculiar rights and attributes." *Smith v. McMicken*, 3 La. Ann. 319, 322; *Succession of Pilcher*, 39 *ibid.* 362; *Rivers v. City*, 42 *ibid.* 1196; *Wolfe v. Pants Co.*, 52 *ibid.* 1357; *Newman v. Eldridge*, 107 La. 315.

In Germany, although the partnership can in its firm name acquire rights and contract obligations, acquire property and other real rights in immovables, can sue and be sued (*Handelsgesetzbuch*, Art. 124), and although, as we have seen, the firm property is specially devoted to the firm creditors to the exclusion of the separate creditors until the firm creditors are paid in full, yet, the codes making no express provision on the point, the question whether a firm is a legal person has been the subject of much discussion and difference of opinion. *Lyon-Caen et Renault*, *Droit Commercial*, t. 2, 100; 1 *Behrends*, *Handelsrecht*, § 62, n. 2.

¹ *Corey*, *Accounts*, 2 ed., 124; *Ames*, *Cas. on Partnership*, 367, n. 1.

² *Lyon-Caen et Renault*, *Droit Commercial*, t. 2, 87.

reach, — an assumption which involves a recognition of the entity of the firm; and even if the assumption is made, the principle is not consistently applied. It is true that the rule of marshalling would oblige the firm creditors first to exhaust the estate against which the separate creditors had no claim, but after the exhaustion of the firm estate the rule of marshalling would permit the firm creditors to come against the separate estates *pari passu* with the separate creditors. Nevertheless, the old rule of distribution has been re-enacted by Congress in Section 5 *f* of the Bankrupt Act of 1898, and must be taken into account in considering the question under discussion; — namely, how is the court which has adjudicated a firm bankrupt, but not the individual partners, or less than all of them, to reach the property of the non-bankrupt partners?

There is a difference of opinion in Continental countries upon the question whether the bankruptcy of the firm necessitates the bankruptcy of the partners.¹ Where the question has been answered in the affirmative the property both of the firm and of the individual members comes into the hands of a bankruptcy court or courts for distribution, but no European jurisdiction has been found where, the firm alone or the firm and some only of the partners being bankrupt, the court has undertaken to seize and administer the property of the non-bankrupt partners. But in the case of *In re Meyer*,² the court, speaking of Section 5 of the Bankrupt Act of 1898, said that, "it is the scheme of these provisions to treat the partnership as an entity which may be adjudged a bankrupt by volun-

¹ In France it is generally held, although not without opposition, that the bankruptcy of the firm involves (*entraîne*) the bankruptcy of the partners. Lyon-Caen et Renault, *Droit Commercial*, t. 8, nos 1144-1148. Sirey, *Code de Commerce*, 3 ed., 469, n° 65. The argument is that, as the Commercial Code provides (Art. 437) that every trader who ceases his payments is in a state of bankruptcy, the cessation of payments by the firm necessarily implies cessation of payments by the partners who are personally liable for the debts of the firm (all the partners in the *sociétés en nom collectif* and the general partners in the *sociétés en commandite*).

The Commercial Codes of Italy (Art. 847), Spain (Art. 923), Portugal (Art. 746), Roumania (Art. 860), and the Konkursordnung of Austria (Art. 199), expressly provide that the bankruptcy of the firm shall entail the bankruptcy of the members who are subject to unlimited liability for the debts. Some of the codes further provide that the bankruptcy of the firm and of its members shall be declared by the same judgment (Italy, Art. 847; Roumania, Art. 860; Portugal, Art. 746; Austria, Art. 199). In Germany, however (Sarwey-Bossert, *Konkursordnung*, 496, n. 1; 1 Behrend, *Handelsrecht*, 589), and in Switzerland (Code Fédéral des Obligations, Art. 573), the law is contrary to that of the jurisdictions above enumerated, and the bankruptcy of the firm does not necessarily draw with it the bankruptcy of the members.

² 98 Fed. Rep. 976, 979.

tary or involuntary proceedings, irrespective of any adjudication of the individual partners as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners as well as the partnership estates, and marshal and distribute them according to equity." Relying upon this dictum, the court in *In re Stokes*,¹ when the firm alone had been adjudged bankrupt and each of the two partners had previously made an assignment of his individual estate for the benefit of creditors, made a summary order upon the assignees of the non-bankrupt partners to transfer the individual property in their hands to the trustee in bankruptcy. Again, in *Dickas v. Barnes*,² the firm had committed an act of bankruptcy by making an assignment for the benefit of its creditors. Some of the partners had participated in making the assignment, and some of them had made individual assignments. Some of the members were adjudged bankrupt, as was also the firm. Some of the members were not adjudged bankrupt, two because they had not committed any act of bankruptcy, and two because they were not subject to involuntary bankruptcy — one being a wage-earner and the other a tiller of the soil. The court ordered all the partners, whether adjudged bankrupts or not, to file schedules of their debts and inventories of their property, and to turn over all their property to the trustee in bankruptcy to be administered as if each of them had been adjudged bankrupts.

The orders in these two cases seem high-handed, and to be defended, if at all, only on the ground of necessity. Is such an order necessary for the protection of the firm creditors, with whom alone the court would seem to be concerned in the bankruptcy of the firm? A firm creditor's interest in the property of the non-bankrupt partner is simply that it may be subjected to the payment of his claim, and this end can be attained by an action against the non-bankrupt partner, who can interpose no defense on the ground that the firm is in bankruptcy. In the converse case of the bankruptcy of a partner without the firm being bankrupt, the Act provides that unless the other partners consent, the firm property shall not be administered in bankruptcy, but that the non-bankrupt partners shall settle the partnership business and account for the interest of the bankrupt partner.³ There is nothing here to

¹ 106 Fed. Rep. 312.

³ Bankr. Act of 1898, § 54.

² 140 Fed. Rep. 849.

prevent a firm creditor in such a case from suing the non-bankrupt partners, and if the justice of the claim were denied it would indeed be their duty to contest it. Nor is there anything in the Act to prevent a firm creditor from suing a non-bankrupt partner when the firm alone is adjudged bankrupt.¹ Still less than the interest of the firm creditor, does the interest of the individual creditor of the non-bankrupt partner require such orders as were made in the two cases above mentioned. It is certainly to the interest of the individual creditor that he should be left perfectly free to enforce his claim against his debtor's property by action, attachment, and execution. It therefore appears that the summary order really hinders both the firm creditors and the individual creditor from prosecuting their rights against their debtor who is not a bankrupt.

It is to be remembered that the nature of the liability of the members of a firm continues to be the same, although the Bankrupt Act provides for the bankruptcy of the firm as an entity; — that is, a liability directly to the firm creditors. Even in countries where the firm is recognized as an entity for all purposes, it is the general rule that the partners are liable *in solido*,² although in most of these countries the enforcement of the liability is de-

¹ The bankruptcy court could not stay these actions under § 11 *a* of the Act. That section reads as follows: "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or if within that time such person applies for a discharge, then until the question of such discharge is determined." This section relates only to suits against persons against whom a petition in bankruptcy has been filed, and in respect to a claim which will be released by a discharge, and is evidently inapplicable to persons who have been found not to be subject to the bankruptcy laws, whether because they have committed no act of bankruptcy or because they have been excepted from its operation. Where an action was brought in a state court against two partners and one of them was afterwards adjudged a bankrupt, he was held to be entitled to a continuance of the action until the question of his discharge should be determined. But a motion by the other partner for a continuance was denied and the action proceeded against him. *Hogendobler v. Lyon*, 12 Kan. 276. Under a provision of the English Bankruptcy Act, similar to Act of 1898, § 11 *a*, above quoted, it was held that when a firm creditor had sued the partnership and had attached its goods, and one of the partners afterwards filed a petition for liquidation under the Bankruptcy Act, the court had no jurisdiction to restrain the action. *Ex parte Isaac*, L. R. 6 Ch. 58.

² See Codes de Commerce, France, Art. 22; Italy, Art. 106; Spain, Art. 127; Hungary, Art. 88; Roumania, Art. 106; Portugal, Art. 105, 153; Switzerland, Art. 544; Russia, Art. 77; Belgium, Loi du 18 Mai 1873, Art. 17; Germany, Art. 128; Holland, Art. 18.

pendent upon certain preliminary proceedings against the firm.¹ Yet where the bankruptcy of the firm does not necessarily involve the bankruptcy of the members of the firm, we find no country in which such a course of procedure is followed as that adopted in the cases under discussion.

In Germany the partners are personally liable to creditors for the debts of the firm.² But although an independent bankruptcy proceeding can be instituted against the firm property,³ yet the bankruptcy of the firm does not involve the bankruptcy of the partner. By Article 122 of the former Handelsgesetzbuch, the firm creditors in case of the bankruptcy of the firm could have recourse against the individual property of the partners only for what remained unpaid after application of the firm property to their claims. This limitation was applicable not only when the partner was in bankruptcy, but also when he was not, thus preventing the firm creditors from pursuing a non-bankrupt partner pending the ascertainment of the deficiency in firm assets. Article 122 was not re-enacted in the new Handelsgesetzbuch, but by Article 212 of the Konkursordnung it was provided that in case a partner was

¹ In Italy, Art. 106, the firm creditor must exhaust his action against the firm before he can sue the partners. So in Roumania, Art. 106, and in Portugal, Art. 153. In Switzerland, Art. 564, the partners can be called upon for payment of firm debts only after dissolution, or after the firm has been unsuccessfully pursued. In Spain, Art. 237, the separate property of a partner cannot be seized for a firm debt until after seizure of the firm property. In Belgium, Loi du Mai 1873, Art. 122, no judgment can be rendered against the partners until after judgment against the firm. In Scotland the debt must first be "constituted" against the firm, and it can then "be enforced against the members as guarantees bound conjunctly and severally with their principal"; as soon as the debt is constituted against the firm, execution is competent against any one of the partners. 1 Clark, Partnership, 285, 627.

In France, according to some authorities, the partner can be sued personally only after judgment against the firm, according to others, only after exhaustion of the firm assets, and according to others, after a demand made in certain ways. Sirey, Code de Commerce, 3 ed. 38, n° 52; Lyon-Caen et Renault, Droit Commercial, t. 2, n° 281. In Louisiana, although the ultimate liability of the partners is *in solido*, during the life of the partnership they cannot be charged individually, except through the partnership, which alone can be sued for a partnership debt. Liverpool, etc., Nav. Co. v. Agar, 14 Fed. Rep. 615. In Germany, however, no preliminary steps against the firm are necessary before action against the partners. Handelsgesetzbuch, Art. 128, 129; 1 Behrend, Handelsrecht, § 73. The creditor may sue the firm and then the partners, or the firm and partners at the same time, separately or in the same action, or only the partners or any one of them. A judgment against the firm alone cannot be enforced against the individual partners, but they must in such case be sued separately. 1 Lehmann-Ring, Handelsgesetzbuch, 277, Nr. 10; Handelsgesetzbuch, Art. 129.

² Handelsgesetzbuch, Art. 128.

³ Konkursordnung, Art. 209.

adjudged a bankrupt, then the firm creditor could seek satisfaction from the separate estate of the bankrupt partner only for what he had failed to get from the partnership estate. As the law of Germany now stands, where only the firm is in bankruptcy the creditors of the firm are deprived of no rights against the individual partners, but may sue them and proceed to judgment and execution against the private property just as before the bankruptcy of the firm.¹

Although differing in some respects, the German law of partnership more closely resembles our law than that of any other country examined. In Germany, as in this country, the partners are personally liable to the full extent, and no preliminary proceedings against the firm as such are necessary to establish the liability of the partners. As in many of our states, the partnership may sue and be sued in the firm name. In Germany the firm can be declared bankrupt without any of the partners being made bankrupt, and *vice versa*. Since the passage of the Bankrupt Act of 1898, this is also our law. But in Germany the bankruptcy of the firm alone has no effect upon the separate property of the partners. It is not seized and administered in the firm bankruptcy,² nor is even the property of another partnership composed of the same members. Unless the individual partner is put into separate bankruptcy his property remains in his hands and is subject to direct attacks by his creditors, both firm and individual. This seems the logical result of a law which makes partners individually liable and at the same time provides for the bankruptcy of the firm apart from the bankruptcy of its members. A law under which the bankruptcy of the firm draws after it the bankruptcy of the members and so brings both firm and separate estates to be administered at the same time, is comprehensible, but, in a jurisdiction where the bankruptcy of the firm does not entail that of the partners, it seems illogical for the court administering the estate of a bankrupt firm to seize or order the surrender of the property of the non-bankrupt partners. The business of the bankruptcy court is to distribute the property of bankrupt debtors, which property may consist of real estate and personal property, including choses in action. But for the court to have

¹ Lehmann-Ring, Handelsgesetzbuch, 313, Nr. 5; Sarwey-Bossert, Konkursordnung, 497, Nr. 2.

² Lehmann-Ring, Handelsgesetzbuch, 312, Nr. 2; 280, Nr. 6; Burchardt, Feststellung im Konkurse, 86, 87.

jurisdiction to deal with property it must belong to the bankrupt. It can get possession of the tangible property of the bankrupt by summary order on those holding it, but it cannot reduce a chose in action to possession by a summary order on the bankrupt's debtor commanding him to turn over enough property to pay it. The trustee must sue to collect the debt. By the summary order in the cases discussed the court does not take possession of any property belonging to the bankrupt, for the property of the non-bankrupt partner does not belong to the firm. The summary order upheld by the Supreme Court in *Mueller v. Nugent*¹ was directed to those who, without honest claim or right, withheld property of the bankrupt, not property which it was conceded belonged to the person holding it.²

It is true that it is also the business of the court to pay the debts of the bankrupt, but how? With the property of the bankrupt, not with the property of third persons. The fact that the debts of the firm are also debts of the non-bankrupt partners should no more give the court power over the property of the non-bankrupt partner than the bankruptcy of one of two joint debtors should authorize the court to seize the property of the non-bankrupt joint debtor. If the bankrupt's trustee has paid more than the bankrupt's share of the debt, he may, no doubt, sue the non-bankrupt joint debtor for contribution, but the court of bankruptcy would never order the non-bankrupt to turn over his property to the trustee either before or after such payment by the trustee.

In the case of *In re Beauchamp*,³ Kay, L. J., said, "A receiving order is only to be made as a step towards an adjudication of bankruptcy, and when you cannot have an adjudication of bankruptcy, it seems to me that you ought not to obtain a receiving order. To allow this receiving order to stand would be in effect to put in

¹ 184 U. S. 1.

² See also the case of *Louisville Trust Co. v. Comigor*, 184 U. S. 18, in which it was held that the court cannot by a summary order compel the payment to the trustee of money which is claimed to be the lawful property of the person against whom the order is directed. When the fact of an honest claim appears, the court can go no further under the order, but must leave the trustee to pursue his remedy in the customary mode of proceeding in the proper court. Nor was the case made any better for the trustee by reason of the fact that the person withholding the money had been made a party to the petition in bankruptcy, although no cause of action was set up and no special relief was prayed against him. See also *Jaquith v. Rowley*, 188 U. S. 620; *In re Michie*, 116 Fed. Rep. 749.

³ [1894] 1 Q. B. 1, 8.

the power of the official receiver the property of a person who could not be made a bankrupt, who has not committed an act of bankruptcy, and who is not subject to the bankruptcy laws. I think, therefore, that the receiving order is a bad one, and we must simply set it aside." The House of Lords cut the knot in that case by holding that a receiving order could be made against the firm "other than" the partner who could not be made a bankrupt.¹

In that case, it is true, the partner who could not be made a bankrupt was an infant, but the language of Kay, L. J., above quoted, shows that he would disapprove of any order which put into the hands of the trustee in bankruptcy "the property of a person who has not committed an act of bankruptcy and who is not subject to the bankruptcy laws," whatever might be the reason for such exemption.

With all deference to the learned court which decided the case of *Dickas v. Barnes*,² the ruling in that case seems nothing short of judicial legislation. The court sustained orders requiring persons who had committed no act of bankruptcy and persons who, being wage-earners or tillers of the soil, could not be adjudged involuntary bankrupts, to file schedules of debts and inventories of property, and to hand over all their property to the trustee of the firm in bankruptcy. We find nothing in the Bankrupt Act to justify these orders. The Act imposes the duty of filing a schedule of property and a list of creditors only upon a bankrupt;³ and the duties of the referee to examine schedules of property and lists of creditors and to prepare and file them when the bankrupts fail, refuse, or neglect to do so, relate only to those filed, or which ought to be filed, by bankrupts.⁴ Nor do we find anything in the section of the Act which defines the jurisdiction of the courts of bankruptcy.⁵

The only clauses of that section relevant to this question are clauses (7)⁶ and (15).⁷ Clause (7) clearly confers no jurisdiction to collect and distribute the estate of a non-bankrupt. Nor can

¹ *Lovell v. Beauchamp*, [1894] A. C. 607.

² 140 Fed. Rep. 849, *supra*, p. 595.

⁴ *Ibid.*, §§ 39 (2), 39 (6).

⁶ "Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

⁷ "Make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act."

³ Bankr. Act of 1898, § 7 (8).

⁵ *Ibid.*, § 2.

clause (15) be invoked. Such an order as the one under discussion cannot be necessary for the enforcement of any provisions of the Act. The order aimed to bring into the hands of the trustee property which the court had no jurisdiction to collect and distribute, because by clause (7) it was only estates of bankrupts which were to be so dealt with. In the case of *Louisville Trust Co. v. Cominger*,¹ the property in question was claimed to be the property of the bankrupt. Yet even in that case jurisdiction to issue a summary order to compel the possessor to turn the property over to the trustee, was denied merely because the possessor made an honest claim of rightful ownership, while in the case under consideration the property is confessedly not that of the bankrupt.

The learned court which sustained the orders in *Dickas v. Barnes* admitted that the orders could not ordinarily have been made against persons not subject to the Bankrupt Act, but the court thought that the rule must be otherwise where the non-bankrupts were partners in a bankrupt firm. The reason given was that "one who combines with others in a partnership enterprise becomes bound for the payment of the partnership debts. As partner he shares the fortunes of the partnership. In certain circumstances it may become subject to the exercise of the powers of a court of bankruptcy, where its resources will be gathered in to satisfy the claims of creditors. One of those resources is the liability of the partner, for which his individual property stands charged."² All this may be conceded, but it is difficult to see why

¹ 184 U. S. 18, *supra*, p. 599, n. 2.

² The court also relied upon the fact that the non-bankrupt partner was a party to the proceedings. It was necessary to make him a party because each partner is entitled to resist the application to have the firm adjudged bankrupt whether the petition be filed by creditors or by the other partners. But if only the adjudication of the firm is prayed for, no affirmative decree can be made against the partner personally. He is only a party to resist, if he pleases, an adjudication in bankruptcy of the firm. If the bankruptcy of the partner is also prayed for, yet, if upon a hearing he is declared not subject to be declared bankrupt, he is also out of the case as to any relief against him which could not equally be had against any person not a party. A stranger is just as much subject to a summary order, wherever it is competent for the court to make it, as is a party to the case. The power to make such orders does not depend upon the question whether the person to be affected by it is a party. The declaration that the partner is not subject to be made an involuntary bankrupt is practically a dismissal as to him personally. He is thenceforth, if not formally dismissed as an individual, a mere nominal party, continuing in the case only so far as to affect his interests in the disposition of the firm estate, and he is not entitled to a discharge either from firm or from individual debts.

these propositions do not lead to a conclusion directly opposite to that reached by the court. The court does not say that the property of a partner is one of the resources of the partnership, but only that one of its resources is the liability of the partner. If this means that the obligation of the partner runs to the firm, we have the ideal entity theory. But in that case the firm has only a right of action against the partner, which must be enforced by a suit brought by its trustee and not by a summary order. If the court meant that the liability of the partner runs not to the firm but directly to the creditors, but yet is one of the resources of the firm, still this liability is not the same thing as the property of the partner. Speaking in a broad general way, it may be said that the resources of the firm available for the payment of the debts include the personal liability of the partners in addition to the ordinary firm assets. But this particular "resource" can be only a chose in action, running either in favor of the firm for the benefit of its creditors, or directly to its creditors, and in either case enforceable against a non-bankrupt only by action or suit. It is submitted that unless the individual property of the non-bankrupt partners can be treated as the property of the bankrupt firm, the judgments in these cases cannot be sustained, since the Bankrupt Act gives the court the right to possession only of the property of the bankrupt. The summary orders in these cases may also deprive the non-bankrupt partner of rights which are not in conflict with the Bankrupt Act.

The wage-earner or tiller of the soil may have accumulated property in excess of the statutory exemptions and he may owe money to relatives or friends whom it may be to his interest and whom he may wish to prefer to other creditors who are strangers. Whether this desire is meritorious or not, it is one to the gratification of which he is entitled in some states, and as to him it is not forbidden by the Bankrupt Act because he is not subject under that Act to be put into bankruptcy. Yet by the summary order his property may be taken away from him and distributed in a manner contrary to his wishes and to the rights given to him by the laws of his state. The Bankrupt Act declares that these classes of persons shall not be made involuntary bankrupts. Yet by these summary orders they are made worse off than if the Bankrupt Act had not exempted them, for they are subjected to the burdens of bankruptcy without receiving any of its benefits. They are deprived of their property, but are not entitled to a dis-

charge from their debts. It would be mockery to say that if he does not like this dilemma the wage-earner, or tiller of the soil, or one who has not committed an act of bankruptcy, can file a voluntary petition in bankruptcy. A man ought not to be forced into bankruptcy by such an indirect process. He commits no wrong by trying to escape bankruptcy, for there is no legal obligation on an insolvent debtor to file a petition in bankruptcy.¹ It is, of course, desirable that the separate property of all the partners should be administered at the same time with that of the firm, but expediency does not excuse the exercise of powers not granted to the court. Congress might perhaps have enacted that an act of bankruptcy by the firm should be treated as an act of bankruptcy by each of its members, but this would not cover the cases of the classes of persons exempted from the provisions of the Act.

Under an ideally developed entity theory of partnership, the partners would be looked upon as contributories bound in virtue of the partnership relation to contribute to the firm, in case of its insolvency or bankruptcy, enough to make up any deficiency in partnership assets to pay firm debts. The trustee as the representative of the firm in bankruptcy would then be entitled to sue the partners for such contribution. But the enactment by Congress of a provision for adjudication of the firm as bankrupt cannot change the nature of the partner's liability. That is fixed by the laws of the states and remains the same; namely, an obligation directly to the creditors. It might, however, seem dogmatic to assert that there could not also be, alongside of and in addition to the direct liability to the creditors, another liability to the firm, enforceable in case of the insolvency or bankruptcy of the firm — a liability to contribute to the payment of debts after the exhaustion of the partnership assets, — but no direct authority has been found. In a suit for the dissolution of a partnership and for an accounting it would seem that if the assets were not sufficient to pay the debts, the court should have jurisdiction to order the *pro rata* share which each partner ought to contribute towards the discharge of the unpaid debts to be ascertained and to appoint a receiver to collect the same. Such an order has been upheld by the Court of Appeals of Virginia in *Jordan v. Miller*,² and this

¹ *Richmond Co. v. Allen*, 148 Fed. Rep. 657, 660; *Wilson v. City Bank*, 17 Wall. (U. S.) 473.

² 75 Va. 442, 454.

doctrine is inferentially supported by the case of *May v. Pagett*,¹ where it was held that an action at law by a receiver of a partnership against a partner to recover a proportional part of the money required to pay firm debts cannot be maintained, when it does not appear that the partnership accounts have been settled or that the receiver does not have in his hands assets of the firm sufficient to pay the firm debts.

It certainly seems narrow and productive of needless litigation for the court in a suit for the dissolution and settlement of an insolvent partnership to limit its activity to the mere distribution of the proceeds of the partnership property, and then to turn the creditors over to other tribunals to recover the balance of their claims from the partners, — resulting, perhaps, in still further suits among the partners themselves if any one should be compelled to pay more than his proper proportion of such balances. The Supreme Court of Indiana, however, has held that the individual liability of a partner is not a liability to the firm and hence not an asset of the firm, and that therefore it was error to order the receiver of the partnership to collect from an assignee for the benefit of creditors of one of the partners the surplus of the separate estate after payment of the individual creditors, and that the firm creditors should be left to make their own proofs separately in the assignment proceedings.²

The law of Hungary furnishes an example of a very satisfactory and equitable method by which the partners may be made to contribute to pay the debts. The Commercial Code, Article 88, imposes upon the partners a joint and several liability for partnership obligations. But it is also provided that when the firm has been adjudged bankrupt and when the assets have been converted into money, and the claims of creditors established so that an order of final distribution can be drawn up, a list may be made showing what sum each member of the firm ought to contribute towards the payment of firm debts. If the members refuse to make the payments thus fixed, the bankruptcy court causes notice to be given of a hearing before the commissioner in bankruptcy, who endeavors to bring about an amicable settlement, and, failing in this, prepares a report of the facts necessary for a decree. This report is presented to the court, which renders a decree thereon,

¹ 2 Pa. Dist. 276.

² *Wallace v. Milligan*, 110 Ind. 498.

notice of which is given to the partners. If the partners do not pay, execution is issued against them.¹

Whether a like result can be obtained in this country without further legislation by Congress, and whether such legislation would be within the power of Congress, are problems the examination of which limitations of time and space at present forbid. But if the liability of the partners is one of the "resources" of the firm,² and if "resources" here means assets, the court ought to find little difficulty in directing the trustee of the firm in bankruptcy to ascertain the proportional amount which each partner should contribute to make up a deficiency in other firm assets, and to collect these amounts by suits against any partners who fail to pay after notice or demand.

J. D. Brannan.

¹ Code de Commerce, Loi sur la Fallite, Art. 257-261, French translation by De la Grasserie.

² *Dickas v. Barnes*, 140 Fed. Rep. 849, 851, *supra*, p. 601.

ROME AND LAW.

THE student of Roman law and its literature finds his subject referred to in terms of the highest eulogy by eminent writers. If, however, he asks, what precisely did the Romans do to entitle them to the name of the greatest juridical people of antiquity; what, if anything, did the Romans really initiate in the matter of law? he will not easily find a clear and specific answer to the question. In the answer to that question, however, lies the true interest and value of the history of Roman law.

Perhaps it might be thought a sufficient reply to say that the Romans were — as in fact they were — the first to perfect a completed system of private law. I think, however, we may go deeper than that; and shall find that the true and great achievement of the Romans, and what alone enabled them to perfect a completed system, was that they were the first people who ever arrived at a correct conception of private law. Doubtless the Greeks would have anticipated them in this, had the external circumstances of Greek life, and the composition of their law courts, been favorable to the development of a scientific conception and system of law. But, in fact, they were not; and this field of intellectual achievement, at any rate, Greece had to leave for Rome to cultivate.

It is, then, my object in the present article to maintain the following proposition, — that the true interest of the study of the history of Roman law lies in this, that the Romans, through their national practical intelligence, stimulated by external circumstances, and also ultimately by the philosophical theory of a "law of nature" as they conceived it, developed a system of private law which did in fact answer to the true nature of private law, and that they were the first people who did develop such a system. If this be so, then in the history of Roman law we have an important chapter of the history of human development; the history of the growth to maturity of a conception of the utmost value to the welfare of mankind; the history of a great step onward in the growth of the human mind, yet one which has been strangely neglected in professed histories of civilization.

"The true nature of private law" is an expression which certainly demands explanation. By private law is here meant that

portion of the law of a state which deals, directly or indirectly, with the mutual relations and transactions of private individuals *inter se*. By the true nature of private law is meant neither more nor less than the nature which such private law would have if the legislator were perfectly wise. If any justification is demanded for calling this the "true nature" of private law, it is perhaps sufficient to appeal to the view which the common use of language supports, that the most perfect development of anything is a development in accordance with its true nature, and that anything which derogates from the perfection of such development is an infringement upon and interference with its true nature. We need not go deeper and cite in support metaphysical theories of the Stoic, or other philosophies, or appeal to religious beliefs as to the divine ordering of the universe. Not, of course, that it is meant that any one can dogmatically assert what the different rules of private law would be if the legislator were perfectly wise, but only that it is possible to discern very clearly what the general nature of private law would be in such a case.

It is surely clear that, in the first place, its rules and principles would be co-extensive with all the transactions and relations into which men in society enter, permitting, and, so far as necessary, regulating or restraining them, but ignoring none, except such as public policy requires to be deliberately left outside the range of legal cognizance. That is to say, all relations and transactions of mankind which can be wisely dealt with at all by the legislator should be within the purview of the law. In the second place, the law should be as simple and natural as it may be without permitting such a degree of looseness as unduly to facilitate fraud or mistake; — that is to say, law should, so far as is in this sense possible, recognize the natural ways of doing business, and the natural ways of entering into relations, whether business relations or other, — such ways as people spontaneously adopt when not obliged to conform to any express legal requirements. And if these should be the characteristics of private law as properly conceived of, so also as to the methods of its development we may say with confidence that the proper method is by a process of juridical analysis of the transactions and relations of mankind, or, in other words, by the discovery of the true nature of these transactions and relations from a juridical point of view, with the object, that is, of bringing to light the reciprocal rights and obligations between the parties to such transactions and relations in the light of reason, justice,

common sense, and public policy. Private law should consist, in the main,¹ of rules thus elicited for the governance and regulation of such transactions and relations by the tribunals of the country, from which other rules may be deduced by a process of reason and analogy, and thus a completed system of law ultimately built up. Now the Romans were the first people who attained to such a conception of law, as distinguished from systems consisting mainly either of usages and customs, more or less arbitrary or fortuitous and implicated with religious ideas and superstitions, or of regulations imposed at will by the legislator. And so says Sir Henry Maine: "The rigidity of primitive law, arising chiefly from its early association and identification with religion, has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form. . . . I know no reason why the law of the Romans should be superior to the law of the Hindoos, unless the theory of natural law had given it a type of excellence different from the usual one."²

In order, then, to show that the Romans did arrive at such a conception of private law, and in briefest to outline the process by which they did so, it is necessary in the first place to glance at the legal condition of things as it presents itself to us in the earliest period of Roman history. This period we may take as extending from the foundation of the Republic, or from the supposed date of the Twelve Tables, to the first quarter of the third century B. C., when Rome had completed the conquest of central and southern Italy, and before she had commenced the acquisition of those provinces which afterwards composed the Roman Empire.

Now, it is no doubt true that at the earliest moment when the light of history dawns upon the scene, the Romans showed in matters of law a condition in advance of that reached by other primitive people. One may point in illustration to the fact that the predominance of the state over the *gentes* or the clan-groups was apparently firmly established; that the institution of private ownership had been developed; that "the conventional language

¹ Some rules there will be which cannot be the result of any such juridical analysis, just as there are some actions which are neither moral nor immoral, but simply unmoral. Such is the rule of the road so far as the law takes cognizance of it; or our legal rule that a will must have two witnesses, and not one only or three. There are rules relating to matters which it is better to regulate one way or another, but in the regulation of which no juridical question, strictly speaking, arises.

² Maine, *Ancient Law*, 1905 ed., 68.

of symbols" had very largely disappeared, and given place in all transactions regulated by law to a direct expression of the will of the parties. But, on the other hand, we find a condition of things still very archaic and indicating little or no conception of the true nature of law. In the first place we see that the law was personal, not extending to all dwellers in Roman territory, but only applying to Roman citizens and to such outlanders as might belong to the favored communities to which by treaty the privileges of Roman private law had been more or less widely extended, or who might have had personal privilege extended to them in that respect. In the second place, we see all that important branch of private law which governs the family relations treated of in the most primitive way, all the members of the family being left under the despotic control of the head of the family, unable to enter into any private transactions, whether marriage or any other, in legally binding fashion, save under his direction, or as his representatives, and incapable of acquiring or owning property in their own right and on their own behalf.

Then, as to the methods of the law for the carrying through such transactions as the law did recognize, they were highly artificial as distinguished from natural, — as distinguished, that is, from those which people are likely to adopt if not interfered with by legal regulation. Thus, if the Roman citizen wished to contract a marriage in the methods then in vogue, he had to go through either an elaborate religious ceremony or else a secular ceremony modelled on a transaction of sale, for the carrying out of which the presence of five witnesses was required, and that of a functionary known as a scale-holder, who was in truth a survival of the days when, the medium of exchange being raw copper, a sale involved a weighing out of the required quantity. If he wanted to make a sale of a landed estate and the appurtenances, he had to go through a similar ceremony with the "copper and the scales"; while as to personal property generally, it is still a moot-point how soon law recognized at all absolute ownership in it, although when it did so, here at least the simple method of delivery by the vendor of the goods, accompanied by payment by the purchaser, with the intention of transferring the property, sufficed. So, too, if the Roman citizen wished to make or receive a legally binding loan of money, the inevitable copper and the scales had to be resorted to, followed by the barbarous remedy of personal bondage, permitted to the creditor against the debtor who was in

default, in the absence of any regulated system either of execution against property or of relief for insolvent debtors. Again, if the purpose was to make a will, either it had to be done by application to the legislative assembly—the *comitia curiata*,—resulting in something analogous to what we would call a private act, or else it had to take the form of a sale by the intending testator, with the copper and the scales and with five witnesses, of his estate to a friend, who on his decease would be ultimately required, under the provisions of the Twelve Tables, to recognize the appointed heir or heirs, against whom legatees and creditors could make their claims. But no recognition of testamentary trusts was given by the law, we are told, until the commencement of the Empire; nor were trusts *inter vivos*, which have so prominent a place in our own social and legal arrangements, ever, it would seem, recognized among the Romans. Again, if a citizen made no will and died intestate, the claims of affection and blood relationship were ruthlessly set aside as against all who did not come within the agnatic circle, from which were excluded all descendants in the female line, as well as any son or grandson who had been emancipated by the intestate from his paternal authority, and any daughter who had contracted marriage in either of the ways above referred to.

And besides the highly artificial and ceremonious methods alone recognized by the law, we see how restricted in number they were. The evidence tends to show that the law had no recognition of such transactions as the simple contract of sale, or of hire, or of deposit or pledge, and that in fact, with two exceptions of very limited application (namely, a formal contract whereby one might bind himself to provide a dowry for a daughter or granddaughter on her marriage, or to be responsible as a surety for the fulfilment by another of some undertaking), the only two juristic acts recognized by the law, in the early period, were the sale by *mancipatio* (the technical name of the transaction with the copper and the scales above mentioned) and the contract of loan known as the *nexum*, involving a like ceremony, and such applications of these methods to transactions to which they in their origin had no reference,—such as emancipation of children or of slaves, adoption, and the forms of marriage and will-making already referred to,—as the jurists were able ingeniously to devise. Especially we notice that there was no recognition by the law in any true sense of a contract of agency whereby one acting for another might render the latter liable to a third party without being liable himself,

a contract upon which so much of the business of modern life depends.

And again, in the case of such obligations as the law did lend binding force to, we read that the strictest interpretation, or what was called *strictum jus*, was applied. As a man had spoken, so was he held to be bound, and, so far as appears, there was but one form of contract in respect to the enforcement of which equitable considerations were admitted, namely, the method of giving security on property known as the *mancipatio cum fiducia*. And as regards legal procedure, the forms of action were few in number, involved the utmost technicality and ceremoniousness, and were conducted in the rigidly technical and narrow spirit which characterizes legal procedure of an archaic type.

And while such were what one may call the positive institutions of the law, there is also no indication of any recognition of the fact that private law in its true nature consists not so much of rules imposed from above, or by the tyranny of custom or of religion, as of rules deduced by the process of analysis and explication of human transactions and relations above referred to. Thus scarcely any instances seem forthcoming of the law recognizing implied obligations. One apparent exception may be pointed to in the warranty of quiet possession accompanying sale by the copper and the scales, but as to that the most approved view now would seem to be that it was not a case of implied warranty, but arose out of express words of the vendor. For the rest, a recognition by the law of the obligation of a guardian honestly to administer the estate of his wards would seem to be almost the only example of legal obligation arising out of a relation of this kind.

The last two centuries and a half of the Republic, especially the latter half of that period, unquestionably saw a notable development and expansion of the law at Rome. We see some deliberate recognition of the claims of equity and justice in modification of the immemorial rules of the *jus civile*, or, as we might say, the old common law. Perhaps the most notable example is what is known as the Publician Edict, wherein were recognized the equitable claims of a *bona fide* purchaser, even though there may have been technical defects in the conveyance to him of the property purchased, and—as against all but the true owner—even though his vendor had, in fact, no title to the property sold. The same tendency operating upon the old common law appears also at this

period in the just modification of the law of prescription, or *usucapio*, by requiring that one should have become possessor *bona fide*, and as the result of some legitimate transaction such as sale or gift, if time was to run in his favor and he was to acquire full legal ownership upon lapse of the necessary period.

We see, too, at this time recognition of the natural claims of blood relationship, in matters of succession to property, secured by the prætorian institution of *bonorum possessio*, whereby, although the prætor could not by his edict transfer the legal inheritance from the common law heir to another, yet he could and did put another, if entitled by nearness of blood relationship, into possession of the estate and protect him in that possession until by length of time legal ownership had accrued to him, in defiance of many of the rigid and narrow rules of agnatic succession. So, too, we see another use of this *bonorum possessio* in the simplification of the law of wills by the establishment of the prætorian will, which required only the presence of seven seals, and did not require evidence of the actual carrying out of the ceremony of the copper and the scales; although this prætorian will did not apparently acquire validity as against the *jus civile* heir, if the latter could prove defects in the accompanying mancipatory ceremony, until an edict of Marcus Aurelius in the latter part of the second century of our era. It was towards the close of the Republic, also, that Roman law, in the words of Sohm, "contrived to accomplish a veritable masterpiece of juristic ingenuity in discovering the notion of a collective person; in clearly grasping, and distinguishing from its members, the collective whole as the ideal unity of the members bound together by the corporate condition; in raising the whole to the rank of a person (a juristic person, namely) and in securing it a place in private law as an independent subject of proprietary capacity standing on the same footing as other private persons."¹

But in the main it seems evident that the legal expansion of Rome in this period is to be ascribed to the growth of a broader system of law, alongside of the old common law, which was applicable not only to Roman citizens, but to all free men at Rome. It seems agreed that this was in the main, in the first instance, a recognition by the prætors of existing mercantile customs and

¹ Sohm, *Institutes* (Ledlie's translation), 2 ed., 202.

methods, practically forced upon them by the increasing numbers of alien traders and residents at Rome, which followed the great expansion of commerce incident to the final defeat of Carthage and to the spread of Roman dominion over the countries subsequently constituting her Mediterranean provinces. These mercantile usages would inevitably be characterized by simplicity and by the ready recognition of common equity and justice, being the outgrowth of the ways which business men naturally adopt of doing business. The four contracts which became recognized during this period as legally obligatory upon the mere consent of the parties to them, contrary to all the traditions of the Roman law, — which regarded such mere consent, unaccompanied by any formal ceremony or fixed legal formulæ, as mere *nudum pactum*, — indicate on their face the probability that their recognition was the outcome of commercial necessities. They were the contracts of sale, letting and hire, partnership, and agency or mandate. The same may be said of the four contracts *re*, that is, accompanied by the delivery of something, which are believed to have first obtained legal recognition in this epoch, namely, the *mutuum*, or simple loan of money without any ceremony of the copper and the scales, the *commodatum*, or contract of gratuitous loan for use, the *depositum*, or contract of gratuitous deposit, and the contract of simple pledge by delivery over of property with that object.

To trade, also, it would seem probable that we may attribute the establishment of what is known as the literal contract, whereby entries in ledgers of receipts and disbursements, made with the consent of the party debited, were held to constitute binding obligations; and whereby by means of cross entries the advantages of negotiability were secured at a time before the invention of what we call negotiable instruments. Part of the advantages of this contract, moreover, lay in the fact that once formed it was *stricti juris*, or in other words the party liable was strictly held by it, and could not plead, as against its enforcement, equitable considerations existing before or arising after it.

On the other hand, all the other contracts above mentioned were what were called *bonæ fidei* contracts, or in other words their legal enforcement was permitted only subject to all proper considerations of justice and equity as between the parties. It is obvious what an opening this left for the legal recognition of implied obligations; as did also the principle of Roman law said

to have been recognized in this period that no one must be enriched at the cost of another's injury. This establishment of *bonæ fidei* actions marks a most important liberalization of the law, inasmuch as under the old *jus civile* it is believed that there was only one contract which was in this sense *bonæ fidei*, namely, the *mancipatio cum fiducia*.

The characteristics, then, of this new system of law that had grown up alongside of the old national common law at Rome, were greater naturalness and simplicity, and more recognition of justice and equity, as distinct from a spirit of rigid technicality, ceremoniousness, and artificiality; and we find indications of Roman lawyers arriving at a generalization in respect of such tendencies and characteristics in the fact that, apparently about the time of Cicero, a new word came into vogue to indicate this portion of the legal system, namely, "*jus gentium*," or, as we might say, "universal law," — a name which indicates the recognition of the fact that the distinguishing feature of this new law, available to all free men, was that it had a certain universal character, as contrasted with a local, tribal, narrowly national character.

But the important thing for our present purpose is to notice that in the main this development of law at Rome in a right and true direction was not the result of any scientific theory of what private law should be, but rather the outcome of circumstances, and of the absolute necessity of devising rules of law applicable to the transactions of trade and the affairs of the numerous transient or permanent non-citizen residents at Rome. The prætors' edict is evidence of the way in which the Roman magistrates met the necessities of the situation with the practical ability which characterized them; but law was still in its empirical stage, nor was the prætors' edict capable of fully meeting the necessities of legal development, any more than legislation by parliament would be in our own day. In order that the expansion and liberalization of the law should advance uniformly towards the building up of a perfect system, it was necessary that some theory, or ideal, as to the true nature of law in general, should establish itself, and this we shall now see was destined in the fullness of time to come to pass.

This ideal was found, apparently about the beginning of the Empire, in the Stoic conception of a law of nature, which the Roman jurists adopted in their speculations, and applied to matters legal in a way in which the Stoics themselves had never done. The contribution of the Stoics to legal studies "consisted more in

the informing spirit, than in any definite conceptions which were borrowed." ¹

It is not necessary here to dilate at length upon the Stoic theory of a law of nature. At its basis was the belief that there is inherent in the universe at large, and in each individual thing, whether animate or inanimate, a certain nature, which, if allowed to take its proper course, would ultimately lead to the attainment of a perfect development of each thing in its own order. This nature, it was held, was essentially reasonable, its rules embodied the *naturalis ratio*, and reasoning beings could, by exercise of their reason, find out what its dictates were, and their duty was faithfully to follow them. And under this conception, as developed by the jurists, not only is there such a nature of man, of animals, and of every individual physical thing, — there is also "a nature of every sort of contract, action, and so on. In each and all of these 'natures' an ordinative energy and determinative rule are observable. These are its *naturalis ratio*." ² In this conception as applied to law the Roman jurists found an ideal, toward the perfect realization of which in the actual law of the land they steadily pressed during the classical period of Roman law.

Now, the more we study this conception of a law of nature, as applied to the transactions and relations of mankind on the juridical plane, in the dry light of modern reason, the more we are likely to come round to the view of Professor Holland, that laws of nature, in this sense, are merely "such of the received precepts of morality relating to overt acts, and therefore capable of being enforced by a political authority, as either are enforced by such authority, or are supposed to be fit so to be enforced." ³ But if the Roman jurists had so regarded it, or spoken of it, it would assuredly never have borne the fruit it bore in the development of law. Their position was by no means merely that of superior persons criticizing the law of the land from the standpoint of their own higher morality. If that had been all, their labors would probably have been as ineffective as the criticisms of superior persons are very apt to be. On the contrary, the jurists attributed, or pretended to attribute, an objective existence and reality to their law of nature. They looked upon it as a veritable *lex*, whose rules were discoverable by reason, and when discovered had an inherent

¹ W. W. Capes, *Stoicism*, 239-240.

² Muirhead, *Private Law of Rome*; 2 ed., 382.

³ Holland, *Jurisprudence*, 10 ed., 30.

authoritative force, and were in fact the truest and highest law.¹ And if such a view of the law of nature was indeed a misconception, we may at least say that it was the most beneficent misconception which ever occupied the human mind, whether we regard its effect on the development of law, or the functions it discharged during the middle ages and as the basis of modern international law.

Moreover, it is to be observed that the semi-official position of the Roman certificated jurists, and the *jus respondendi* which they possessed, and the authoritative force of their legal opinions when produced before the *judices* to whom lawsuits were remitted by the prætor, enabled them in large measure to secure the embodiment of their views in the actual law of the land. As it has been concisely expressed, the bar gave the law to the bench at Rome, not the bench to the bar, as with us. The only objection to the phrase is that, strictly speaking, there was no bar and no bench.

The really important thing to notice, however, is that the principles of the law of nature as deduced by the Roman jurists, and the methods of its development in their hands, were entirely in accordance with the true conception of private law as above outlined. "The conception of nature as a source of law," says Mr. Bryce, "found a solid basis for law in the reason and needs of mankind, and it softened the transition from the old to the new, first by developing the inner meaning of the old rules while rejecting their form, extracting the kernel of reason from the nut of tradition, and secondly, by appealing to the common sense and general usage of mankind, embodied in the *jus gentium*, as evidence that nature and utility were really one, the first being the source of human reason, and the latter supplying the ground on which reason worked."² And again, says the same writer, "Speaking broadly, the law of nature represented to the Romans that which

¹ Mr. Bryce, however, evidently thinks the Roman jurists knew very well the true state of the case. "A modern precisian," he says, "might say that the Romans ought to have called it, not 'the law of nature,' but 'materials supplied by nature for the creation of a law,' a basis for law rather than the law itself. To the Romans, however, such a criticism would probably have seemed trivial. They would, had the distinction been propounded to them, have replied that they knew what the critic meant, and had perceived it already; but that they were concerned with things, not words, and having a practical end in view, were not careful about logical or grammatical minutiae." ² Bryce, *Essays on History and Jurisprudence*, 152-153.

² ² Bryce, *ibid.*, 156.

is conformable to reason, to the best side of human nature, to an elevated morality, to practical good sense, to general convenience. It is simple and rational, as opposed to that which is artificial or arbitrary. It is universal, as opposed to that which is local or national. . . . It is natural, not so much in the sense of belonging to men in their primitive and uncultured condition, but rather as corresponding to and regulating their fullest and most perfect social development in communities, where they have ripened through the teachings of reason.”¹

The characteristics of the speculative Roman *jus naturale*, as Voigt summarizes them, are its potential universal applicability to all men, among all people, and in all ages, and its correspondence with the innate conviction of right; and its leading propositions, the recognition of the claims of blood, the duty of faithfulness to engagements, the apportionment of advantage and disadvantage, gain and loss, according to the standard of equity, and the supremacy of the *voluntatis ratio* over words or forms.²

But directly private law was conceived of as a system to be developed by a process of reasoning working upon fundamental principles of justice and common sense, and not consisting merely of ancient customs and ceremonies, or of rules arbitrarily imposed by authority, a true conception of law had been reached. Herein lay what was indisputably true in the conception of a *lex naturæ*. To conceive of law in this way was the actual achievement of Rome, and when once this idea of law had been attained it was an inestimable addition to the thought of mankind. Many a chapter, little creditable to the history of English law, would have been non-existent if such a conception had at all times possessed the minds of judges and of legislators. Until English law had been delivered from the technicalities and artificial logic with which lawyers surrounded the feudal land law, on the one hand, and from the methods of legal administration known as forms of action on the other, it was impossible for it to be placed upon the basis, and developed along the lines on which law had been placed, and which law had attained, in the classical period of Roman jurisprudence. Now, however, if we study the development of our case law, it is clear that a process of development is going on largely, if not altogether, in harmony with the true conception of private

¹ 2 Bryce, *Essays on History and Jurisprudence*, 151-152.

² *Das Jus Naturale*, 304, 321-323; cited in Muirhead, *Private Law of Rome*, 2 ed., 381-382.

law as above unfolded. We have at last attained to the position to which the Roman jurists led the way.

Thus we are able to understand the true meaning of a passage in one of Sir Henry Maine's essays which must have puzzled many a student. In his essay on Roman Law and Legal Education, he says: "It is not because our own jurisprudence and that of Rome were *once* alike that they ought to be studied together; it is because they *will be* alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity; and because we in England are slowly, and perhaps unconsciously and unwillingly, but still steadily and certainly, accustoming ourselves to the same modes of legal thought, and to the same conceptions of legal principle, to which the Roman jurisconsults had attained after centuries of accumulated experience and unwearied cultivation."¹

The same idea is to be found expressed in clear and striking language by Sir Frederic Harrison in his articles on the English School of Jurisprudence, published a good many years ago in the *Fortnightly Review*. "The present generation," he says, "has witnessed a really striking phenomenon. This is no less than the re-annexation of the English law on to the great body of principle, of which the Roman law is the basis and the framework. Henceforward the insularity of English law is a thing of the past. . . . English law has worked itself free from whole masses of those feudal anomalies and accidents which in the last century made it seem something so monstrous and hopeless to men trained in the civil law: It never was at any time in so unmethodical a state as was the law of France before the Code of Napoleon, or the Roman law in the time of Cicero. But now that much of the old confusion has been cut away, it is seen that the bulk of the English law is entirely comparable to, and in many respects in complete harmony with, the bulk of the civil law. The law relating to land, to buildings, and to the settlement of estates, and necessarily the law of succession and wills, is from political causes deeply stamped with the history of its feudal origin. It is this startling and picturesque side of English law which has filled the lawyers of England and of the Continent alike with the conviction that English law is a unique production of the human mind. But this is merely the

¹ Cambridge Essays for 1856, printed as an appendix to *Village Communities in the East and West*, 332.

historical casing of our law. Behind this feudal accident, when we study it by a sound analysis, it is seen the bulk of the English law, the whole law of contract, the whole commercial law (and this is ever becoming more and more the bulk of the civil law), really, as the old books said, 'runs on all fours' with that modified and modernized form of the law of Justinian which is the groundwork of the law of all civilized Europe."¹

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¹ 31 Fortnightly Review 129.

A PHASE OF ACCOUNTING IN TRADE-MARK CASES.

PROTECTION against unfair dealing by imitation of trade names, marks, or symbols, is now afforded the injured trader on one of two grounds, — either by the judicial recognition of his technical trade-mark to which he may have an exclusive right in connection with a particular class of goods, or by the protection of names, marks, or signs to which he has no such exclusive right, on the ground of unfair competition.¹ It is the "good will" of the merchant, or the right to have the benefit of the reputation of his products, which is thus guarded by the courts.²

In *Elgin National Watch Co. v. Illinois Watch Co.*,³ Chief Justice Fuller defines thus the technical trade-mark:

"The term has been in use from a very early date, and generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words, but as its office is to point out distinctly the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose."

Within the field of marks which are capable of exclusive ownership, a trader may become entitled to the exclusive use of a name or symbol, provided he can show priority of ownership and continuous use thereof associated with a particular class of goods.⁴ And his rights, so far as an injunction is concerned, are to be protected irrespective of the innocent character of the defendant's acts.⁵ In cases of unfair competition the courts in England logically enough do not require fraud on the part of the defendant as a necessary element of a complainant's cause of action.⁶ But fraud

¹ For a discussion of the relationship between the law of trade-marks and of unfair competition, see 10 HARV. L. REV. 275, and 12 *ibid.* 243.

² *George G. Fox Co. v. Glynn*, 191 Mass. 344, 349.

³ 179 U. S. 665, 673.

⁴ *Gilman v. Hunnewell*, 122 Mass. 139.

⁵ *Regis v. Jaynes*, 185 Mass. 458, 460.

⁶ *Millington v. Fox*, 3 Myl. & C. 338, 352.

seems to be a necessary prerequisite in the United States courts.¹ The remedy in trade-mark cases may be by action at law or in equity; in cases of unfair competition it may be in equity; in cases of trade-mark the injunction is absolute against the use of the offending mark;² in the other class of cases it is against the use of the complainant's marks without signs sufficiently distinguishing to prevent confusion of the two commodities in the public eye.³

If the aggrieved trader resorts to a court of equity and is held entitled to an injunction to protect him against infringement of his trade-mark or against unfair competition, he is in the United States, in most cases, entitled to an account of damages and profits to be estimated by a master in chancery. Generally speaking, the successful complainant can recover the damages sustained by reason of the wrongful user and the profits earned by the defendant through such wrongful user.⁴ If, however, the defendant's acts were purely accidental, without any deliberate intention to deceive the public, an account of profits may not be ordered.⁵

It is the purpose of this article to discuss a rule relating to an accounting of profits affirmed by the Supreme Court of Massachusetts in a recent trade-mark case. This rule is found in the case of *Regis v. Jaynes*.⁶ The plaintiffs in that case had built up since 1877 a small business in the sale of dyspepsia tablets in boxes marked "Rex." They began advertising in 1898, and the business was confined to Haverhill, Mass., and surrounding towns. The defendants were retail druggists, and began in Boston in 1903 advertising on a large scale "Rexall Dyspepsia Tablets" in ignorance of the plaintiffs' rights. The defendants' labels, except for the similarity of names, differed from those of the plaintiffs, but both remedies consisted of two sorts of pills to be taken in connection with each other. The defendants did a large busi-

¹ *Elgin Nat'l Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 674; *Howe Scale Co. v. Wyckoff*, 198 U. S. 118; *French Co. v. Saratoga*, 191 U. S. 427, 440. And see *W. R. Lynn Shoe Co. v. The Auburn-Lynn Shoe Co.*, 100 Me. 461; 16 HARV. L. REV. 272.

² *Bass v. Feigenspan*, 96 Fed. Rep. 206.

³ *Reddaway v. Banham*, [1896] A. C. 199.

⁴ *Saxlehner v. Eisner & Mendelson Co.*, 138 Fed. Rep. 22; *Walter Baker & Co. v. Slack*, 130 Fed. Rep. 514; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 207.

⁵ *Elgin Nat'l Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 674; *Saxlehner v. Siegel-Cooper Co.*, 179 U. S. 42; *N. K. Fairbank v. Windsor*, 124 Fed. Rep. 200; *Ellen v. Slack*, 24 Sol. J. 290; *Moet v. Coustou*, 22 Beav. 578.

⁶ 191 Mass. 245.

ness, but almost entirely in Boston and so substantially outside the territory of the plaintiffs. There was no fraud involved except that the defendants continued to sell their tablets after notice from the plaintiffs of infringement of their trade-mark "Rex"; and this continuance caused absolutely no diversion of the plaintiffs' business. The plaintiffs obtained an injunction against the use by the defendants of the name "Rexall Dyspepsia Tablets" in connection with the sale of their pills.¹ A supplemental bill was filed praying for damages and profits for infringement since the filing of the original bill. The case was recommitted to the master; and at the hearing before him the defendants offered to prove that no actual deception or mistake had occurred by reason of the defendants' acts, and that there had been no sales of the defendants' tablets as and for the goods of the plaintiffs during the period covered by the accounting. The master ruled that both these offers were immaterial and that the defendants were liable for all profits. The defendants alleged exceptions. The unusual question was, therefore, directly presented to the Supreme Court of Massachusetts, whether, in an accounting in a trade-mark case, the defendant cannot show in relief of himself that he made no sales by reason of the resemblance between the two labels, and that there had been no confusion of the competing commodities in the public mind.²

Judge Sheldon, who expressly dealt with the case apart from the trade-mark statute in Massachusetts,³ found sufficient fraud on the part of the defendants in their continuing infringement after the filing of the original bill to satisfy the requirements of *Saxlehner v. Siegel-Cooper Co.*⁴ and other cases.⁵ He overruled the defendants' exceptions, and held that a defendant must account for all profits earned by the infringing trade-mark, irrespective of the question whether the purchasers had in fact bought the goods of the plaintiff believing them to be the goods of the defendant. To the correctness of this ruling we now address ourselves.

The situation was certainly an unusual one. In the ordinary accounting, from the nature of the subject-matter, it is as difficult for the plaintiff to show that any one purchaser from the defendant

¹ *Regis v. Jaynes*, 185 Mass. 458.

² *Regis v. Jaynes*, 191 Mass. 245.

³ Mass. Rev. Laws, c. 72, § 9.

⁴ 179 U. S. 42.

⁵ *Supra*.

would have bought the plaintiff's goods had he not been misled into buying the defendant's, or that any one purchaser actually bought the defendant's goods as and for those of the plaintiff, as it is for the defendant to show the contrary. But here the small local character of the "Rex" business as compared with the infringing "Rexall" business enabled the defendants to show affirmatively what is rarely possible. Ought not the infringer to be allowed the benefit of this proof?

Let us turn to the authorities in Massachusetts, in this country, and in England. In Massachusetts, certainly, the Supreme Court was not fettered by any previous judicial expression in favor of the complainants' position.¹ The first case before the full bench

¹ Outside the present case, there is no trade-mark or unfair competition case in Massachusetts which has reached the full bench in which an accounting has been completed. Up to 1878 there was no decree for damages or profits in a trade-mark suit in equity in any case before the full bench.

Suits in equity to protect symbols, in which the defendants succeeded and in which, of course, no question of accounting arose, are: *Ames v. King*, 2 Gray (Mass.) 379; *Rogers v. Taintor*, 97 Mass. 291; *Emerson v. Badger*, 101 Mass. 82; *Hallett v. Cumston*, 110 Mass. 29; *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69; *Gilman v. Hunnewell*, 122 Mass. 139; *Magee Furnace Co. v. LeBarron*, 127 Mass. 115; *Connell v. Reed*, 128 Mass. 477; *Warren v. Warren Thread Co.*, 134 Mass. 247; *Chadwick v. Covell*, 151 Mass. 190; *American Order of Scottish Clans v. Merrill*, 151 Mass. 558; *Weener v. Brayton*, 152 Mass. 101; *Covell v. Chadwick*, 153 Mass. 263; *Burt v. Tucker*, 178 Mass. 493; *Garst v. Hall & Lyon Co.*, 179 Mass. 588; *Dover Stamping Co. v. Fellows*, 163 Mass. 191; *Martin v. Bowker*, 163 Mass. 461; *Crossman v. Griggs*, 186 Mass. 275; *Lothrop Co. v. Lothrop, Lee & Shepard Co.*, 191 Mass. 353; *Messer v. The Fadettes*, 168 Mass. 140.

Actions at law in which the defendant succeeded: *Thomson v. Winchester*, 19 Pick. (Mass.) 214; *Marsh v. Billings*, 7 Cush. (Mass.) 322; *Chase v. Mayo*, 121 Mass. 343.

In the following cases, although an injunction was granted restraining the use of plaintiff's symbols, no accounting of profits was ordered: *Hoxie v. Chaney*, 143 Mass. 592; *Russia Cement Co. v. LePage*, 147 Mass. 206; *International Trust Co. v. International Loan & Trust Co.*, 153 Mass. 271; *Noera v. Williams Mfg. Co.*, 158 Mass. 110; *American Waltham Watch Co. v. U. S. Watch Co.*, 173 Mass. 85; *New England Awl Co. v. Marlborough Awl Co.*, 168 Mass. 154; *Flagg Mfg. Co. v. Holway*, 178 Mass. 83; *Hildreth v. McDonald Co.*, 164 Mass. 16; *Viano v. Baccigalupo*, 183 Mass. 160; *Bowman v. Floyd*, 3 Allen (Mass.) 76; *Samuel v. Spitzer*, 177 Mass. 226; *Cohen v. Nagle*, 190 Mass. 4; *George G. Fox Co. v. Glynn*, 191 Mass. 344.

Commonwealth v. Jacob Rozen, 176 Mass. 129; *Commonwealth v. Abe Strauss*, 188 Mass. 229; and *Commonwealth v. R. I. Sherman Mfg. Co.*, 189 Mass. 76, were criminal proceedings under statute and have no application to this case.

In *Frank v. Sleeper*, 150 Mass. 583, an injunction was granted and the case sent to a master to assess damages. Nothing was said as to profits. The case is still pending in the Supreme Court; and no final decree has been entered.

New England Awl Co. v. Marlborough Awl Co., 168 Mass. 154, was the case of an imitation of a label. The Supreme Court gave the plaintiff an injunction and sent the case back to the Superior Court, where accounting was waived.

in a trade-mark suit in which an injunction and accounting were ordered was *Lawrence Mfg. Co. v. Lowell Mills*.¹ In 1878 the court below made such a decree for injunction, damages, accounting, and costs. This was affirmed by the full bench in 1880. There is nothing in the case to show that any profits were ordered by the full bench to be paid to the plaintiff, which were not profits made from customers who were deceived by the similarity between the defendant's mark and that of the plaintiff.

*Lawrence v. Hull*² was dismissed shortly in the present case on the ground that it raised none of the questions before the court. It was a bill in equity based on the statute³ to restrain the unlawful use of the plaintiff's name in a partnership designation. The complainant secured his injunction, but the court went on to say:⁴

"We see no ground for giving the plaintiff profits. The plaintiff has not been competed with unfairly, and his loss bears no relation to the defendants' gains. He ought not to recover more than compensation for his loss, even if the reasoning of the Supreme Court of the United States should seem to suggest that possibility in patent cases. *Tilghman v. Proctor*, 125 U. S. 136, 148. Compare *Root v. Railway Co.*, 105 U. S. 189, 214, 215."

There seems to be nothing in the statute under which the proceeding in *Lawrence v. Hall* was brought, which should differentiate the principles of accounting there binding from those in a proceeding to protect a common law or statutory trade-mark. This language above quoted seems to recognize a difference between the rule of accounting in a patent case under the express provisions of the United States Statutes, and an accounting in cases closely allied to the present. *Lawrence v. Hull* deserves more consideration than the Supreme Court in the present case gave it.

¹ 129 Mass. 325.

² 169 Mass. 250.

³ Mass. Pub. Stat., c. 76, § 6. "No person carrying on business in this commonwealth shall assume or continue to use in his business the name of a person formerly connected with him in partnership, or the name of any other person, either alone or in connection with his own or with any other name or designation, without the consent in writing of such person or of his legal representatives." § 7. "The supreme judicial court may restrain by injunction the use of trade-marks or names in violation of the provisions of this chapter."

⁴ P. 252.

The Massachusetts court, therefore, when the principal case was presented for its consideration, was dealing with an open question, except in so far as the defendants' position was favorably affected by *Lawrence v. Hull*.

Outside of Massachusetts there are but few cases in the United States involving this point. Such a one, however, seems to be *Baker v. Baker*,¹ in which the court says:²

"The evidence shows that the substantial grievance of the complainant is found in the conduct of William H. Baker at the inception and early in the history of his competition. This was remedied as to the future by the preliminary injunction in the first action. That injunction gave the full measure of relief to which the complainant, under the circumstances of the case, was entitled, except such a recovery for profits and damages as he might be found entitled to. The evidence upon the accounting failed to disclose that the complainant was entitled to any recovery of profits, or any except nominal damages, by reason of the defendant's conduct. It failed to disclose that a single person had purchased goods marketed by the defendant, supposing them to be the product of the complainant, or that the complainant had lost a single customer by the defendant's conduct."

Therefore the complainant recovered only nominal damages.³

There is a class of cases holding that the defendant cannot prove in reduction of profits what proportion is due to the com-

¹ 115 Fed. Rep. 297.

² P. 299.

³ The case of *N. K. Fairbank Co. v. Windsor*, 118 Fed. Rep. 96, tending the other way, was overruled in 124 Fed. Rep. 200. Paul, Trade Marks, ¶ 326, relies on this overruled case and on *Lever v. Goodwin*, 36 Ch. D. 1 (see *infra*), for his statement, — "Profits recoverable in equity for unfair competition are governed by the same rule as in cases for infringement of trade-marks, and are not limited to such as accrue from sales in which it is shown that the customer is actually deceived, but include all made on goods sold in the simulated dress or package, and in violation of the rights of the original proprietor." And see 10 HARV. L. REV. 275, 298. See *Little v. Kellam*, 100 Fed. Rep. 353; *Liebig's Extract Co. v. Walker*, 115 Fed. Rep. 822, 828; *La Republique Française v. Hegeman*, 116 Fed. Rep. 1021; *Luddington Novelty Co. v. Leonard*, 127 Fed. Rep. 155, 157; *Williams v. Metcalf*, 106 Fed. Rep. 168, 172.

In *Sawyer v. Kellogg*, 9 Fed. Rep. 601, there is general language that a defendant must account for all profits. But the particular point now under discussion was not presented to the court, nor did it indicate how it would decide it.

But in *Atlantic Milling Co. v. Rowland*, 27 Fed. Rep. 24, 25, the court said extra-judicially: "It is argued that the evidence does not show that the orator would have made this profit if the defendants had not. This might be true, and not affect the rights of the parties. If the defendants made profits by their invasion of the orator's rights, the orator is entitled to them whether the same profits would have been made by the orator or not, and not to any more if they would, for the same profits could not be made by both."

modity itself and what to the trade-mark, by showing that he could have sold other like goods to other people under a different mark.¹ These authorities are not decisive of the position taken by the Supreme Court of Massachusetts in the present case, though their reasoning tends to support it.

Outside the federal courts the Supreme Court of Massachusetts finds in the United States substantial support in a case in Kentucky.² There the defendants closely imitated the plaintiff's plows down to minute details, except the trade-mark. Although the complainant had sustained no damage, the court ordered an injunction and accounting of all profits on the ground that the defendants were endeavoring to palm off their plows as the plows of the plaintiff. Real intent to commit fraud existed in this case, and the court emphasized this in its decision:³

"In this case it has been adjudged that the imitation was made with the design on the part of the appellees to make profit by the deception, and we perceive no reason why the appellants should not have the profits if they claim nothing more."⁴

The court was clearly wrong in granting the injunction at all, which somewhat discredits the case. The defendants had a clear right to imitate the complainant's plows, provided they did not imitate the trade-mark and took reasonable means to distinguish

¹ *Benkert v. Feder*, 34 Fed. Rep. 534 (where there was undoubtedly confusion, as the defendant marked his goods with the complainant's own name); *Saxlehner v. Eisner*, 138 Fed. Rep. 22; *Graham v. Plate*, 40 Cal. 593; *Hopkins, Trade-Marks*, 2 ed., 383.

² *Avery & Sons v. Meikle & Co.*, 85 Ky. 435.

³ P. 446.

⁴ See also *Beebe v. Tolerton & Stetson Co.*, 117 Ia. 593. This was an action under a statute allowing profits for a forged label. On p. 597 the court said: "The statute can only be upheld on the theory that these profits are either compensatory or penal in character. If compensatory, the plaintiff must show that he or the association he represents has suffered some damage, and there is no pretense of any such proof in this case."

El Modello Cigar Mfg. Co. v. Gato, 25 Fla. 886. The bill alleged that the defendant had palmed off their cigars as and for those of the plaintiff, and that the defendants had deprived the plaintiff of profits. The defendants demurred that damages were not recoverable in excess of profits. No question of profits was involved, though the court said by way of dictum that all profits were recoverable. But in view of the allegations of the bill admitted by demurrer, none of this language is in point.

Drummond Tobacco Co. v. Tinsley Tobacco Co., 52 Mo. App. 10, 31. Accounting was here denied on the ground that it was difficult to determine the exact data which formed the elements of such an account.

Stonebraker v. Stonebraker, 33 Md. 252, 263; *Stagg Co. v. Taylor*, 95 Ky. 651, 669.

the two makes. The court could properly enjoin the sales of the plows unless marked with a distinguishing characteristic, but the relief should have gone no further. The correct rule in such a case is that adopted in *Flagg Mfg. Co. v. Holway*.¹ In that case the defendants imitated the plaintiffs' zither closely, except the trade-mark. The Supreme Court held that the plaintiffs were entitled to an injunction restraining the defendants from selling zithers not more plainly marked with their own name, or some other distinguishing mark; no accounting was granted, although asked for.

*Avery & Sons v. Meikle & Co.*² was cited with approval in the recent case of *W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.*,³ not cited by the court in the principal case. It is probable, though not entirely clear from the report, that in the Maine case all profits were the fruit of the defendant's deception. The approval given to the far reaching Kentucky rule, that profits recoverable in equity in cases of trade-mark or of unfair competition are not limited to such as accrue from sales where it is shown that the customer is deceived, is therefore, in all likelihood, *obiter dictum*.

On the other hand, in *Clark Thread Co. v. William Clark Co.*⁴ two manufacturers were entitled to a mark which the defendant was enjoined from infringing. The court did not hold the defendant liable to each owner separately for all profits earned from wrongful sales, or to each owner for half the profits. It said:

"Its responsibility to the complainant should be confined to such profits as were diverted from the complainant, and such damages as the complainant otherwise sustained, leaving the defendant answerable to the Mile-End Company for the profits unlawfully diverted from it."

Whatever general language in the earlier federal cases there can be found against the rule favoring the defendants, must be considered as superseded by *Baker v. Baker*.⁵ In other American jurisdictions the rule favoring the plaintiffs receives substantial support from the somewhat doubtful case of *Avery v. Meikle*,⁶ and discredit from *Clark Thread Co. v. William Clark Co.*⁷ To the other United States authorities outside Massachusetts not much importance can be attached.

¹ 178 Mass. 83.

² 100 Me. 461, 479.

³ 115 Fed. Rep. 297.

⁴ 56 N. J. Eq. 789.

⁵ 85 Ky. 435.

⁶ 56 N. J. Eq. 789.

⁷ *Supra*.

The English authorities are not entirely clear.¹ The later cases throw some doubt on the earlier ruling which favored the plaintiffs' contention in the case under discussion. In *Edelsten v. Edelsten*,² the vice-chancellor in the court below refused to limit the account of profits required of an infringer in a trade-mark case on the ground that there was no proof of deception of the public. This order was affirmed shortly in the upper court. Except in so far as the defendant did not offer actual proof negating deception, this case is authority for Judge Sheldon.

In *Ford v. Foster*,³ accounting was allowed of profits earned after the filing of the bill. No point was made by counsel that the defendant's liability should be reduced in the absence of proof of actual deception. The question was very shortly dealt with.

But there seems to be some doubt indirectly cast on these rulings by the more recent case of *Hodgson & Simpson v. Kynoch, Ltd.*⁴ The court said:⁵

"I grant an injunction restraining the defendant company, its servants and agents, from selling or offering for sale, any of its soaps in any of the four wrappers above mentioned in their present forms with lions' heads upon them, or so as to induce the belief that any of such soaps were manufactured by the plaintiffs. Then, though no actual case of a purchaser being misled into buying the defendants' instead of the plaintiffs' soap has been proved before me, I think if the plaintiffs insist upon more than nominal damages and ask for an inquiry as to damages, I must grant such an inquiry, reserving the costs of it."

Nevill, Q. C. "May we have, instead of an inquiry as to damages, an account of profits?"

Romer, J. "No, certainly not. I think it would be most unjust in this case."⁶

¹ In England the plaintiff stands in a better position in patent, trade-mark, and unfair competition cases than in the United States. In patent litigation in England the defendant may be compelled to destroy the infringing article or deliver it to the plaintiff. *Betts v. DeVitre*, 34 L. J. Ch. 289; *Lancashire Explosives Co. v. Roburite Explosive Co.*, 12 R. P. C. 470.

In trade-mark and unfair competition cases in England it is unnecessary to prove fraud on the part of the defendant to obtain an injunction. *Millington v. Fox*, 3 Myl. & C. 338, 352; *Cellular Clothing Co. v. Maxton*, [1899] A. C. 326, 334, 335.

² 1 De G. J. & S. 185.

³ L. R. 7 Ch. 611.

⁴ 15 R. P. C. 465.

⁵ P. 475.

⁶ And see *Magnolia Metal Co. v. Atlas Metal Co.*, 14 R. P. C. 389; *Sanitas Co., Ltd. v. Condy*, 4 R. P. C. 530.

Kerley, *Trademarks*, 2 ed., 425: "But if the court is satisfied that the defendant's goods have not, to any substantial extent, been passed off as those of the plaintiff,

The English cases bring out another important point. If goods are sold in a deceptive dress, the infringing manufacturer is not helped by selling only to jobbers who knew of the fraud. This fact makes the jobbers equally guilty, but does not diminish the moral or legal guilt of the manufacturer. As to him the fact that the jobbers bought because of the opportunity for fraud given them only shows that the manufacturer's profits were due to the wrongful dress and not to the quality of his goods, and that therefore he should not be allowed to retain such wrongful profits. And so it was held in *Lever v. Goodwin*,¹ where Cotton, L. J., said : ²

"The defendants, as I understand, do not sell anything to retail purchasers; what they sell they sell to middlemen, that is to say, to people who purchase from them as wholesale merchants, and who are going to sell it by retail; and the complaint against the defendants is this: 'You have dressed up your soap in such a dress that those middlemen to whom you sell it are enabled, by its having that deceptive dress upon it, to sell it to the ultimate purchasers as the soap of the plaintiffs.' The profit for which the defendants must account is the profit which they have made by the sale of soap in that fraudulent dress to the middlemen. It is immaterial how the middlemen deal with it. If they find it for their benefit not to use it fraudulently, but to sell the soap to the purchasers from them as *Goodwin's*, that cannot affect the question whether the sale by the defendants to those middlemen of this soap in a fraudulent dress was a wrongful act. It still remains a wrongful act, because it put into the hands of the middlemen the means of committing a fraud on the plaintiffs by selling the soap of the defendants as the soap of the plaintiffs."³

It is obvious that the case would be entirely different if the jobber bought in ignorance of the resemblance complained of and no user was ever deceived, because the wrongful acts would not have led to any sales, and none of the defendant's profits would have been due to the wrongful acts.

On the one side are *Avery v. Meikle*;⁴ *W. R. Lynn Shoe Company v. The Auburn-Lynn Shoe Co.*;⁵ *Eldesten v. Eldesten*;⁶ *Ford*

although infringing or deceptive marks have been used upon them, the plaintiff ought not, it is submitted, to have any option. To allow him to take the profits made by the defendant's trade in goods which were in fact sold without deception would be unjust."

¹ 36 Ch. D. 1.

² P. 7.

³ So *Saxlehner v. Apollinaris Co.*, 14 R. P. C. 645, 657. Mr. Justice Kekewich doubted the correctness of this ruling, but felt bound by it.

⁴ 85 Ky. 435.

⁵ 100 Me. 461.

⁶ 1 De G. J. & S. 185.

v. Foster:¹ on the other, *Lawrence v. Hull*;² *Baker v. Baker*;³ *Clark Thread Co. v. The William Clark Co.*;⁴ *Hodgsdon v. Simpson & Kynoch, Ltd.*⁵ These are the closest authorities for and against the principal case.

It is respectfully submitted that the case was wrongly decided. No court has a right to confiscate the defendant's property to make a present to the plaintiff. The doctrine of exemplary damages is repudiated in Massachusetts;⁶ and courts of equity in particular are supposed to act on the principle that equity abhors a forfeiture.⁷ Accordingly, some just reason must be found which makes it equitable that the plaintiff should receive the defendant's profits. In the ordinary case of infringement of a trade-mark the justice of such a payment is easily seen. The defendant has attempted to obtain and has obtained the benefit of a part of the plaintiff's good will by so marking his goods that the public buy on the strength of the good reputation of goods bearing the mark. The infringing goods being accordingly sold by virtue of the plaintiff's good reputation and not by reason of their own merit, it is certainly more reasonable to say that the profits are the property of the plaintiff than of the defendant. This is the only justification for giving the plaintiff the profits made by the defendant. The principal case falls entirely outside this rule. The plaintiffs had no good will of value in Boston, and the public did not buy the infringing goods on the plaintiffs' good will, of which they had never heard, but did buy on the defendants', which was well known. Accordingly, the profits, being due to the defendants' reputation and not to the plaintiffs', are properly the property of the defendants, and the court should not confiscate them and give them to the plaintiffs.

The plaintiffs are amply protected by injunction against any future confusion, and *ex hypothesi* there has been none in the past. Had the defendants never used the mark held to resemble that of the plaintiffs, the latter would have been in precisely the same commercial position as they actually were. None of the defendants' customers had the plaintiffs in mind in making their purchases. Not one cent of the defendants' profits was made from the plain-

¹ L. R. 7 Ch. 611.

² 115 Fed. Rep. 297.

³ 15 R. P. C. 465.

⁴ *Barnard v. Poor*, 21 Pick. (Mass.) 378.

⁵ *Bispham, Equity*, 3 ed., 238.

² 169 Mass. 250.

⁴ 56 N. J. Eq. 789.

tiffs' mark. Rulings that the defendant should account for profits where there has been actual diversion of business, or where the purchaser has confused the competing marks, even though that purchaser would not have been a customer of the plaintiff had the defendant not crossed his path, are fair enough, because in both of these cases the defendant's profit comes out of the plaintiff's reputation. But it seems completely unjustifiable to hold that the money of the defendant's customers, who never heard of the plaintiff or of the plaintiff's goods, and who bought on the good reputation of the defendant's goods, rightfully belongs to the plaintiff.

The rule adopted in this case is not supported by the analogy of bills for the infringement of patents. The complainant in patent accountings has cast upon him the burden of proving affirmatively what profits the defendant derived from his infringement. This sum may be nothing, or a part, or the whole of the profit derived from the sale of the infringing machine or product, according as the plaintiff succeeds or fails in proving that a part, or the whole of such profits was due to the patented invention.¹ In the case of sales of patented products ordinarily the entire profits must be accounted for, because it must be that the patented product is different from any other article or it would not be patentable; and therefore it is hard to escape the inference that the profits from selling it all proceeded from the patented invention. But it has never been held that the defendant is precluded from proving that the patented invention had no effect on his profits. For instance, if the defendant should contract to deliver a certain number of bolts suitable for certain work, and should supply patented bolts when unpatented bolts equally good for the particular purpose could have been supplied under the contract, there is no doubt the plaintiff would not be entitled to any of the profits from such a sale, although if the contract had required the use of the patented bolts the defendant would have been obliged to pay his entire profits. The distinction is not technical. It is simply a matter of common sense. In the first case the defendant got no advantage whatever by the infringement, and in the latter case his entire profit was due to it; and so in the first case he should pay nothing, and in the second case all. It is hard to see, therefore, how the court, in the principal case, could adopt the following analogy:

¹ *Garretson v. Clark*, 111 U. S. 120.

"If any analogy from patent cases is to be adopted, we ought rather to follow the rule that where the infringing machine or device derives its entire commercial value from the patented feature or improvement, then the patentee is entitled to the entire profits realized from its sale."

This remark refers to the well-known rule of patent law, that where no apportionment is possible, because the infringing feature dominates the whole machine, the defendant must account for all profits. This rule, in other words, governs only in a case where the defendant is unable to apportion. Why the court thought that, in a trade-mark case where the defendants offered to prove affirmatively that *none* of the value of these infringing goods was due to the resemblance to the plaintiffs' mark, it ought to adopt the rule of patent law laid down for cases where the plaintiff proves affirmatively that the *entire* value of the infringing goods is derived from the patented feature, is not apparent. The direct contrary seems to be the natural conclusion. Under the view held by the court in this extract, if an unfortunate defendant happened by one label to infringe several trade-marks, he would be obliged to account to the owner of each for the full profits derived from the sale of goods bearing that label. He would have no chance, as he would if the rule of the patent law were adopted, to apportion the profit due to each feature of the infringing label, and to account to each owner only for the profits derived from the use of that feature which involved his mark.

It is interesting to note that, not content with giving the plaintiffs all the money actually earned by the defendants, no part of which was earned by the aid of any resemblance to the plaintiffs' trade-mark, the court gave in addition a fictitious profit by refusing to permit the defendants to charge as a part of the expense of the business the fair proportion of rent, heat, light and clerk hire, on the ground that the defendants could not prove that these charges would have been less if the infringing goods had not been sold. The court, in so doing, directly rejected the doctrine of the carefully considered Tremolo case in the Supreme Court of the United States,¹ and established an artificial profit as the profit to be paid instead of the real profit figured as any business man would figure it.

It is suggested that a rule which requires the plaintiff to prove what profits are derived from confusion and what are not, is too

¹ 23 Wall. (U. S.) 518.

harsh; that this would place a burden on injured merchants which they could not sustain. Yet in patent cases the complainant is obliged to apportion what profits are due to the patented device and what to other elements of the infringing machine.¹ This burden was so difficult in the case of design patents² that Congress had to be resorted to for relief which the courts could not afford.³ The difficulty that a plaintiff may have in proving his case has not been considered in other branches of the law an adequate reason for relieving him of that burden.⁴ Such an argument, at best, only affects the burden of producing proof, not the burden of establishing the case after the proof is all in. Were this burden shifted by allowing the plaintiff to recover all profits, unless the defendant can show affirmatively that none were the result of deception, this hardship on the plaintiff would no longer exist. However, it is respectfully submitted that the plaintiff should be compelled to prove his case in accordance with rules of just compensation. Any questions with reference to the difficulty of proof, real or fancied, in this regard, should be left to the decision of Congress or the state legislatures, as in the case of design patents, not to the courts.

Guy Cunningham.
Joseph Warren.

BOSTON.

¹ *Garretson v. Clark*, 111 U. S. 120, 121.

² See *Dobson v. Hartford Carpet Co.*, 114 U. S. 439.

³ Act of Feb. 4, 1887, 24 U. S. Stat. at L. 387, 388.

⁴ Compare cases where a depositor sues a warehouseman for negligence in reference to the *res*. *Willett v. Rich*, 142 Mass. 356; *Murray v. Internat'l S. S. Co.*, 170 Mass. 166. See, however, *Saxlehner v. Eisner*, 138 Fed. Rep. 22, and *Graham v. Plate*, 40 Cal. 593, 598, where this difficulty affected the courts' decisions in favor of the complainants.

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CONSTITUTIONALITY OF LEGISLATION AFFECTING CORPORATIONS EXCLUSIVELY. — It has been preemptorily decided that corporations as well as natural persons are within the protection of the Fourteenth Amendment;¹ but, like natural persons, they are subject to regulation by the states under the police power, which cuts across that amendment. May police regulations, however, be put upon corporations exclusively? Undoubtedly under the police power there may be classification, but it must be based on some reasonable distinction. In the earlier cases in the United States Supreme Court, the rule was loosely laid down that "special legislation is not class legislation if all persons brought under its influence are treated alike under the same conditions."² The later cases define the rule more sharply, and require further that the legislation in its classification bring within its influence all who are under the same conditions.³ By this test regulations concerning corporations solely, when correcting evils arising only from corporate enterprises, would be constitutional. No doubt it is on this ground that statutes abolishing the fellow-servant rule with regard to railroad corporations⁴ are to be upheld; the hazards of railroading afford a reason for the discrimination, and the court takes judicial notice that railroads are run exclusively by corporations.⁵ It must be admitted, however, that some courts have sustained these statutes on the ground that the word "corporation" therein is to be construed as also including natural persons.⁶ On the other hand, where the evils sought to be checked are incident to private as

¹ Santa Clara County v. R. R., 118 U. S. 394, 396; R. R. v. Nebraska, 164 U. S.

403.

² Missouri Pac. R. R. v. Mackey, 127 U. S. 205, 209.

³ Connolly v. Union Sewer Pipe Co., 184 U. S. 540; R. R. v. Ellis, 165 U. S. 150.

⁴ For a collection of these statutes, see 2 Labatt, Master and Servant, § 743 *et seq.*

⁵ See Ballard v. Miss. Cotton Oil Co., 81 Miss. 507, 569.

⁶ Pittsburgh, etc., R. R. v. Lighthouse, 78 N. E. Rep. 1033 (Ind.); Schus v. Powers-Simpson Co., 85 Minn. 447.

well as corporate enterprises, laws applicable only to corporations would clearly be unconstitutional.⁷ And such was the holding of a recent Indiana case where the statute required railroad and other corporations to answer in damages for injuries to employees caused by superior servants. *Bedford Quarries Co. v. Bough*, 80 N. E. Rep. 529. There is no reason in the nature of things why corporations should be treated differently in this respect from large partnerships, such as some express companies, or from individuals.

There is a way, however, in which corporations can be regulated differently from individual enterprises. Today practically every corporation holds its charter subject to amendment, alteration, or repeal by the legislature, at least when the public interest requires it. The law is settled that neither property nor vested rights of a corporation can be taken, without compensation, by the exercise of this power, nor can the aim of the charter be so changed as to alter the original purpose of the grant.⁸ But laws such as that in the present case do not transgress any of these limitations, and so could be imposed on domestic corporations under this power of amendment. Similar regulations could be placed upon foreign corporations as a condition precedent to their right to do business within the state, — at least where the business is not interstate commerce, — for a state can exercise unhampered discretion with respect to such privilege.⁹ The question then remains, how statutes like the present, general in their wording, are to be construed. Some cases, including the principal case, hold that they cannot be construed as amendments to the incorporation laws, since they are applicable to foreign as well as domestic corporations.¹⁰ Ignoring this objection, other courts construe them as such amendments.¹¹ Why could not these statutes be held to fulfill at once the twofold function of an amendment to the incorporation laws and a regulation of the permission to foreign corporations to do business within the state? It is a maxim of constitutional law that a decent respect for the legislature and the proper balance of the powers of government require the judiciary not to declare a law unconstitutional unless the necessity is obviously compelling. Therefore, in the absence of statutory¹² or constitutional provisions, such as those of Indiana,¹³ regulating the amendment of laws and the enactment of statutes, general laws such as the one under discussion should be upheld on the twofold basis suggested.

ACCEPTING RATE CONCESSIONS UNDER THE ELKINS ACT. — The Elkins Act, amending the Interstate Commerce Act,¹ has received but little judicial interpretation, so that two recent sets of indictments for violation of it must be considered largely experimental. The clause especially concerned pro-

⁷ *Ballard v. Miss. Cotton Oil Co.*, *supra*. See *Lavallee v. R. R.*, 40 Minn. 249, 252.

⁸ *Lake Shore, etc., R. R. v. Smith*, 173 U. S. 684, 698.

⁹ *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28; *Hancock Mut. Life Ins. Co. v. Warren*, 181 U. S. 73, 76.

¹⁰ *Johnson v. Goodyear Mining Co.*, 127 Cal. 4.

¹¹ *Shaffer & Munn v. Union Mining Co.*, 55 Md. 74; *State v. Brown & Sharpe*, 18 R. I. 16; *R. R. v. Paul*, 64 Ark. 83; *aff.* 173 U. S. 404.

¹² See *Braceville Coal Co. v. People*, 147 Ill. 66; *State v. Haun*, 61 Kan. 146.

¹³ *Burns' Ann. Ind. Stat.*, §§ 115, 117.

¹ *Interstate Commerce Act*, 24 Stat. at L. 379; *Elkins Act*, 32 Stat. at L. 847.

vides that giving or accepting a concession from the established tariff is unlawful, and imposes penalties. *United States v. Standard Oil Co. of New York*, U. S. Dist. Ct., W. D. N. Y., April, 1907. One set of indictments alleged that the established tariff for the through shipment of petroleum from Olean to Rutland *via* the Pennsylvania Railroad and three connecting carriers was 19 cents per hundredweight, and that the defendant accepted the rate of 16.1 cents between the same points *via* the Pennsylvania and two connecting carriers, — in fact a less direct route. The defendant demurred, and the court overruled the demurrer. A reasonable reading of the whole statute, combined with the attitude of the Supreme Court that an inequality of service justifies an inequality of charge, requires us to read into the clause stated the words "for a similar service."² So the main question³ under this indictment is whether the defendant received a similar service for a lower rate. Courts lay down the rule very broadly that any inequality of condition or change of circumstance creates a dissimilar service.⁴ The court in the present case proceeds on the assumption that services in transporting between the same termini are similar. The first query is whether this assumption is correct in view of the different number of carriers in each route. The only case on the point holds squarely that this is sufficient to justify different rates.⁵ Further, the court's assumption omits from consideration the element of time in transit, which has properly been held sufficient to render services dissimilar.⁶ Public policy would seem to permit the more circuitous route to charge less, that it might compete for business.⁷

The other set of indictments alleged that the defendants accepted a rate of 17 cents per hundredweight for the transportation of petroleum from Olean to Burlington, knowing that the rate from places near Olean to Burlington was 33 cents per hundredweight. The court overruled the defendant's demurrer on the ground that, since the defendant must be presumed to have known that the difference was unreasonable, a violation of the statute was charged. We must assume that both these rates were published, as nothing was alleged to the contrary. The courts have recently held that the statute constitutes the published rate the only lawful one, which must be adhered to until changed,⁸ and that the statute makes it a crime for a shipper to take less than this rate.⁹ The necessary inference would seem to be that if the shipper paid this rate, he would be safe. In deciding otherwise in the present case, the court puts him in a curious position. If he knows, or should know from the facts he possesses, that his competitors must pay

² *Interstate Com. Com. v. B. & O. R. R.*, 145 U. S. 263; Same *v. Ala. Midland Ry.*, 168 U. S. 144; *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 97.

³ This indictment might have been held demurrable for failing to allege that the 16.1 cent rate was not published. Such a ruling would have accorded in spirit with one in *United States v. Standard Oil Co.*, 148 Fed. Rep. 719, 727.

⁴ For an example of what minor facts are held sufficient to produce dissimilarity, see *United States v. Chi. & N. W. Ry.*, 127 Fed. Rep. 785.

⁵ *Corporation of Birmingham v. Manchester, etc., Ry.*, 10 R. & Can. Tr. Cas. 62. As our statute was modelled after an English one, the courts sanction the use of English cases as precedents. See *Interstate Com. Com. v. B. & O. R. R.*, *supra*, 282, 284.

⁶ *Delaware State Grange v. N. Y., etc., R. R.*, 3 Interst. Com. Rep. 554.

⁷ The attitude of the Supreme Court in a recent case, that a carrier should be given great leeway in fixing terms upon which it will agree to carry beyond its own line, supports the view suggested in the present case. *Southern Pacific R. R. v. Interstate Com. Com.*, 200 U. S. 536.

⁸ *United States v. Standard Oil Co.*, 148 Fed. Rep. 719.

⁹ *United States v. Wood*, 145 Fed. Rep. 405.

the carrier rates disproportionately high, he commits a crime by paying the only lawful rate. Apparently he must stop shipping until he can get the carrier to charge him more or his competitor less. Even this solicitation for his rival's welfare may not keep him out of crime, for the Interstate Commerce Commission or a jury may easily differ from him on the reasonableness of the new rates, or even declare the original proportion reasonable. The obvious objection to the court's position is well framed by Mr. Justice Brewer: "In order to constitute a crime, the act must be such that the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable."¹⁰ For this reason it would seem necessary to say that the penal section of the statute applies only to discriminations between persons, and not between localities. The aggrieved parties should have used the procedure afforded by the statute to have the proportion made reasonable. Neither set of the indictments alleges all the essentials to constitute what the statute makes the crime, — the acceptance, for a similar service, of a concession from the published and filed rate.

THE LAW GOVERNING THE RECORDING OF AN ASSIGNMENT OF A CHOSE IN ACTION. — There are various views as to what law governs the voluntary assignment of a chose in action.¹ The most prominent two favor respectively the law of the domicile of the creditor and the law of the place of assignment. The cases on the subject are singularly inconclusive. Their language sometimes supports the first view entirely,² sometimes the second,³ or even couples the two as if they were equivalent;⁴ but actual decisions, where domicile and place of assignment have not coincided, have not been found. Between the two views, choice must be made according as an assignment is considered a transfer of property or a power of attorney to enforce the chose in action. A transfer of property is governed by the law of its situs.⁵ A chose in action, however, being incorporeal, has of course no real situs; yet, relying on the often-quoted maxim that *mobilia personam sequuntur*, courts have said that the assignment should be governed by the law of the creditor's domicile. But an assignment of a chose in action is preferably not to be regarded as a transfer of property. A chose in action is a personal matter; its very essence is the mutual assent of two parties; and there is difficulty in seeing how a new person can be injected into the agreement by one party without the consent of the other. However, the assignor can give his assignee a power of attorney to collect, and contract to allow him to use it; and that this is the nature of an assignment seems substantiated by the history of the law.⁶ The existence of this power should be determined wholly by the law of the place where it is given, for

¹⁰ *Tozer v. United States*, 52 Fed. Rep. 917.

¹ Law of place of performance, see *Abt v. American, etc., Bk.*, 159 Ill. 467; law of domicile of debtor, see *In re Queensland, etc., Co.*, [1891] 1 Ch. 536. See also Dicey, Conf. of Laws, 533.

² *Davis v. Mills*, 99 Fed. Rep. 39; *Howard Nat'l Bk. v. King*, 10 Abb. N. C. (N. Y.) 346. See Story, Conf. of Laws, § 397; 4 Cyc. 63.

³ *Black v. Zacharie*, 3 How. (U. S.) 483; *McClintick v. Cummins*, 3 McLean (U. S.) 158. See 22 Am. & Eng. Encyc. 1343.

⁴ *Allen v. Bain*, 2 Head (Tenn.) 100; *Smith v. Chicago, etc., Ry.*, 23 Wis. 267.

⁵ *Cammell v. Sewell*, 5 H. & N. 728; *Marvin Safe Co. v. Norton*, 48 N. J. L. 410.

⁶ *Watson v. Bagaley*, 12 Pa. St. 164. See 3 HARV. L. REV. 340, 341.

the parties, acting in the jurisdiction of that law, can acquire from their actions only such rights as that law gives.⁷

In a recent federal decision a creditor, domiciled in Michigan, made an assignment in Connecticut of all his future book accounts and bills receivable. By Connecticut law an assignment of future earnings is not valid against creditors unless recorded; by Michigan law no recording is necessary. In a petition by the Connecticut assignee, filed in Michigan bankruptcy proceedings against the assignor, it was held that the assignment was valid against creditors though not recorded. *Union Trust Co. v. Bulkeley*, 150 Fed. Rep. 510 (C. C. A., Sixth Circ.). The case raises both the foregoing and an additional problem. Whether there was any assignment should be determined by the law of Connecticut. If the statute of Connecticut⁸ were properly to be construed as making the power of attorney defeasible, as by condition subsequent, on failure to record before the attaching claims of other creditors, Michigan would have to acknowledge here that the petitioner had no valid claim.⁹ But such a statute is best to be treated as applying only to proceedings before the court of the state which enacted it. It pertains to the order in which a court will distribute a fund in its possession, or the proceeds of a claim against a debtor over whom it has jurisdiction. This is matter of procedure, and is governed, as the case properly says, by the law of the forum.¹⁰ The question is in the first instance a construction of the Connecticut statute. But acknowledging that there was a valid assignment, the necessity of recording it would depend on the law of Michigan.

RIGHTS OF THE OWNER OF AN IDLE PATENT IN EQUITY. — The patent law of the United States is the direct outgrowth of the old English system of royal grants of exclusive rights to carry on a particular trade or manufacture. These monopolies, which were given sometimes to raise revenue but often to reward favorites, became so burdensome upon the people that in the reign of James I all were abolished by statute except letters patent to inventors.¹ The reason for this exception is evident. Unlike the owner of other monopolies, the patentee was regarded as giving something to the public in return for the favor which he received.² This reason explains why at the present time in the United States, when the drift of judicial decision and of legislation is against monopoly, there is a disposition on the part of the courts to treat the patentee leniently. His right of legal monopoly is regarded in the nature of a contract right, given him and his assigns by statute in consideration of the benefit conferred upon the public.³ Therefore, though the law apparently gives the owner of a patent the right to do as he pleases with it, and recognizes in that right a species of property, so

⁷ *Cf. Blackwell v. Webster*, 23 Blatchf. (U. S.) 537; *Carnegie v. Morrison*, 2 Met. (Mass.) 381.

⁸ *Laws of Conn.*, 1905, c. 78.

⁹ *Cf. Vanbuskirk v. Hartford, etc., Co.*, 14 Conn. 582. *Contra, Martin v. Potter*, 34 Vt. 87.

¹⁰ *Cf. Kelly v. Selwyn*, [1905] 2 Ch. 117.

¹ 21 Jac. 1, c. 3.

² See *Cartwright v. Arnott*, cited in *Harmer v. Playne*, 11 East 107; *Grant v. Raymond*, 6 Pet. (U. S.) 218, 242; *Magic Ruffle Co. v. Douglas*, 2 Fish. Pat. Cas. 330, 333.

³ See *Attorney-General v. Rumford Chemical Works*, 32 Fed. Rep. 608, 617; *Nat'l Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. Rep. 693, 701.

that he may let his invention lie idle if he so desires, yet the real spirit which animates the patent statutes is that the public should be benefited by the use of the invention.⁴ The Circuit Court of Appeals has recently held, however, that the owner of a patent may have an injunction against the infringement of it, although there has been deliberate non-user of the patent-right. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 150 Fed. Rep. 741 (First Circ.).

In England such a case is expressly covered by the statute, which provides for compulsory licenses in the case of non-user of the privilege.⁵ In this country, in the absence of express statutory provision, the courts, at least those of equity, should contrive so far as possible to attain the same desirable result. There have been no decisions directly in point, though the language in many cases intimates broadly that the owner has an absolute right to deal with his patent as he sees fit.⁶ However, these were mostly cases where the legal right was in question, and the courts were not considering whether equity in its discretion might not decline to aid in evading the true spirit of the patent law. There are many instances where equity refuses its extraordinary remedy, even though the right at law may be perfectly clear and the damages inadequate.⁷ And equity interferes in favor of the patentee, not so much to prevent multiplicity of suits at law or because damages there may be inadequate, as to protect to the fullest extent the right which the state has given in return for the benefit conferred. It would seem, therefore, that an injunction should be denied in this case, where the patentee is demanding his side of the bargain and giving nothing in return,⁸ unless, perhaps, he agrees to use the patent himself or to allow it to be used by others on payment of a reasonable license fee.

RIGHTS OF A LIFE TENANT WHO BUYS IN MORTGAGED PROPERTY. — It seems impossible to say that the relation between life tenant and remainderman is that of trustee and *cestui*,¹ or is of a fiduciary nature at all.² There is no privity between them, for a title gained by adverse possession during the existence of the life tenancy will not be valid against the remainderman.³ The life tenant, moreover, unlike a trustee, may buy in the interest of the remainderman without disclosing all he knows.⁴ To be sure, he owes certain duties, such as the duty not to commit waste; and an incumbrance bought in will enure to the benefit of the remainderman.⁵ But these well-established results do not arise, as many courts have loosely said, from a

⁴ See *Kendall v. Winsor*, 21 How. (U. S.) 322, 328. See also *Robinson*, Patents, 4 ed., § 43.

⁵ 2 Edw. 7, c. 34, § 3. See *Terrell*, Patents, 4 ed., 248.

⁶ See *Heaton-Peninsular, etc., Co. v. Eureka Specialty Co.*, 77 Fed. Rep. 288, 294; *Bement v. Nat'l Harrow Co.*, 186 U. S. 70, 91.

⁷ *Mansfield v. Sherman*, 81 Me. 365. See 16 HARV. L. REV. 444.

⁸ See *N. Y. Paper Bag, etc., Co. v. Hollingsworth, etc., Co.*, 56 Fed. Rep. 224, 231. But see *Fuller v. Berger*, 120 Fed. Rep. 274, 278. Cf. *Brown Saddle Co. v. Troxel*, 98 Fed. Rep. 620; *Nat'l Folding Box, etc., Co. v. Robertson*, 99 Fed. Rep. 985.

¹ See 11 HARV. L. REV. 333.

² *Dicconson v. Talbot*, L. R. 6 Ch. 32; *Fidelity, etc., Deposit Co. v. Dietz*, 132 Pa. St. 36.

³ *Higgins v. Crosby*, 40 Ill. 260.

⁴ See *Anderson v. Lemon*, 8 N. Y. 236, 237.

⁵ See *Whitney v. Salter*, 36 Minn. 103; *Myers v. Reed*, 17 Fed. Rep. 401, 407.

fiduciary relation between the parties. Such reasoning has led in some situations to unsupportable conclusions, of which a recent English case is an example. There it was decided that the husband of a life tenant of property subject to a mortgage, who bought it in at foreclosure, held it for the benefit of the remainderman. *Griffith v. Owen*, [1907] 1 Ch. 195.

The court seeks support for its decision in those cases where a trustee of a lease is not permitted to renew it for his own benefit, even though the lessor has refused to renew for the *cestui que trust*.⁶ Analogous with these are the cases where a partner who renews a partnership lease for himself is made to hold for the benefit of his co-partner.⁷ The principle of such cases, resting upon grounds of public policy,⁸ is merely an application of the rule restricting the power of the trustee to deal with the trust *res*. But if the relation between life tenant and remainderman is not fiduciary, such authorities are not here in point. There is also an argument from those cases where a renewal by a life tenant of a lease with power of renewal is held to enure to the benefit of those in remainder.⁹ But there the reason is not that there is a fiduciary relation between the parties, nor has such an explanation been generally given in the cases. The new lease is regarded merely as a graft upon the old, and the remainderman takes according to the original settlement.¹⁰ Neither line of reasoning adopted by the court can sustain the conclusion of the case. The doctrine does, however, find considerable support in this country.¹¹

Though it is hard to see why the life tenant should not ordinarily have the right to buy in the property at foreclosure and to hold it upon the same terms as any one else, yet if there is any fraud the situation is different. If the scheme is merely colorable to cut out those owning subsequent estates, the life tenant of course holds in trust. Many of the cases, and possibly the present case, might be explained on this ground. The trust does not arise, however, because of any fiduciary relation between the parties, but is an ordinary constructive trust raised because of the fraud. Permitting the land to be sold for taxes and then buying it in at the sale, is another example of the same practice, and the life tenant very properly is not permitted to cut out the remainderman in this way.¹² In short, the life tenant should not, through the power which his possession gives him, be permitted to gain any secret advantage over the remainderman.¹³ This, it is believed, is as far as the remainderman can legitimately be protected.

EQUITABLE RELIEF FROM FORFEITURE OF A LEASE INCURRED BY BREACH OF COVENANT. — Equitable relief is often given from the forfeiture otherwise resulting from the breach of covenants in leases. It will be convenient first to consider the general situations where there has been neither accident, mistake, fraud, nor surprise. To summarize broadly the holdings of the

⁶ *Keech v. Sandford*, 2 Eq. Cas. Abr. 741.

⁷ *Featherstonhaugh v. Fenwick*, 17 Ves. Jr. 298.

⁸ See *Blewett v. Millett*, 7 Bro. P. C. 367, 373.

⁹ *Rawe v. Chichester*, Ambl. 715.

¹⁰ *Taster v. Marriott*, Ambl. 668.

¹¹ *Bowen v. Brogan*, 119 Mich. 218; *Keller v. Fenske*, 123 Wis. 435. See *Cockrill v. Hutchinson*, 135 Mo. 67. *Contra*, *Fidelity, etc., Deposit Co. v. Dietz*, *supra*. Cf. *Rector of Christ Church v. Mack*, 93 N. Y. 488.

¹² *Varney v. Stevens*, 22 Me. 331.

¹³ See *Nesbit v. Tredennick*, 1 Ball & B. 29, 46.

cases, equity relieves from forfeiture incurred by breach of covenants to pay rent¹ or taxes,² but does not relieve when the covenant is to insure,³ to repair,⁴ not to assign or sublet without permission,⁵ or to perform other collateral duties.⁶ Of this result there is no explanation that is entirely satisfactory, when it is remembered that the sole object of equity's interference is to further justice.⁷ It is difficult even to lay down an arbitrary rule stating when equity will act. It is frequently said that equity will relieve when the broken covenant was for the payment of money. But this is too general; it fails to provide, for example, for a recent holding that there will be no relief from a forfeiture due to the non-payment of taxes, when as a result a third party has secured a *prima facie* irredeemable tax title.⁸ *Kahn v. King*, 204 U. S. 43. Another generalization commonly advanced is that the criterion is whether the lessor can be adequately compensated if equity relieves from the forfeiture. However, as Lord Eldon pointed out, equity will refuse relief in some situations where no question of compensation can be raised, as where an insolvent lessee assigns to one financially responsible.⁹ A third statement is that where the performance of the broken covenant was the thing desired, and the forfeiture was inserted merely as security therefor or incidental thereto, equity will relieve. If we add to this the qualification that it must be possible to award the lessor such compensation that he gets substantially what he contemplated, we have, it is believed, the rule that comes nearest to covering the results of the decided cases.

There is talk in the authorities as to the effect of the lessee's conduct on his right to relief. It is conceded that his acts may be so culpable, and hence his hands so unclean, as to disentitle him to any consideration in equity.¹⁰ Also, the improbability of his future performance may cause relief to be denied.¹¹ But, in general, the mere wilfulness of the breach will not bar the lessee from relief in cases where relief is ordinarily granted.¹² It is believed that "wilful" serves merely to distinguish the lessee's conduct in this class of cases from his conduct on those occasions on which he acted through accident or mistake, or was defrauded or surprised.¹³ There is no doubt, however, that on the latter occasions relief is sometimes procured for the lessee by the *bona fides* of his conduct and its attendant circumstances, where ordinarily no relief would be granted. When in good faith he tries to perform his covenant, but is prevented by accident, — for instance, where continued unpropitious weather prevents outside repairs, — equity will not permit the forfeiture.¹⁴ The same result is reached when the breach is due

¹ *Sheets v. Selden*, 7 Wall. (U. S.) 416. *Abrams v. Watson*, 59 Ala. 524. But see *Palmer v. Ford*, 70 Ill. 369, 374.

² *Giles v. Austin*, 62 N. Y. 486.

³ *Green v. Bridges*, 4 Sim. 96.

⁴ *Croft v. Goldsmid*, 24 Beav. 312. Cf. *Hagar v. Buck*, 44 Vt. 285.

⁵ *Barrow v. Isaacs*, [1891] 1 Q. B. 417; *Roberts v. Geis*, 2 Daly (N. Y.) 535, 540.

⁶ *Hills v. Rowland*, 4 DeG. M. & G. 430 (to use land in a certain way); *Descarlett v. Dennett*, 9 Mod. 22 (not to allow a way across premises).

⁷ Perhaps because Parliament recognized that equity did not do substantial justice in all cases, the field is now covered by statute in England. 15 & 16 Vict., c. 76, §§ 210-212; 23 & 24 Vict., c. 126, § 1; 44 & 45 Vict., c. 41, § 14.

⁸ *Gordon v. Richardson*, 185 Mass. 492, reaches the same result when the tax title was still redeemable.

⁹ *Hill v. Barclay*, 18 Ves. Jr. 56, 63. Cf. *White v. Warner*, 2 Meriv. 459.

¹⁰ *Bacon v. Park*, 19 Utah 246.

¹¹ See *Dunklee v. Adams*, 20 Vt. 415, 422.

¹² See *Henry v. Tupper*, 29 Vt. 358, 372.

¹³ See *Gregory v. Wilson*, 9 Hare 683, 689.

¹⁴ *Bargent v. Thomson*, 3 Giff. 473.

to the lessee's pardonable mistake.¹⁵ The court sometimes stretches this rather far to relieve in a hard case; but it is clear that mere forgetfulness cannot be considered mistake.¹⁶ In these cases, also, it is a necessary prerequisite to the lessee's relief that the lessor can be properly compensated. Again, as a general rule, if the breach was caused by the lessor's fraud, or if he even innocently justified the lessee in believing that certain conditions in the lease were waived, so that the lessee in reliance on the supposed waiver broke his covenant, or if in general the lessor's conduct makes it unconscionable for him to take advantage of the breach, equity will relieve against the forfeiture.¹⁷

THE IDENTITY OF CRIMINAL OFFENSES. — It is a fundamental principle of criminal law that no one shall be twice put upon trial for the same offense. To prove identity, it is necessary to show that the offenses are the same in fact and in law.¹ Two exactly similar indictments may charge two distinct offenses in fact, and it is for the jury to determine by a comparison of the evidence whether identity exists. The more difficult problem is to determine whether the two offenses are the same in law. They may be distinct from each other, yet if both include the same offense they may give rise to double jeopardy. Thus, if one is equal to the other plus some new criminal element, or if they respectively equal the same crime, plus a different criminal element, and if on a trial for either the merits of the common crime are passed on, such trial necessarily bars trial for the other.² A well-settled exception is that a conviction for battery will not bar a subsequent trial for homicide if the victim dies in the meantime.³ The reasons given are unsatisfactory. As battery is an important element of homicide, a punishment for both offenses would clearly be a double punishment for the battery.

Offenses may be distinct because different in nature or in species, so that each is substantially a separate injury to the state. If no one criminal element is a necessary ingredient of both offenses, it is clear that the injury to the state is double.⁴ Because the same evidence may be used to prove both offenses, it does not of necessity follow that the crimes are identical. Thus, one and the same act may be a violation of divers statutes, — as selling liquor without a license, selling liquor on Sunday, and selling liquor to a minor.⁵ In a recent case under the Sherman Anti-Trust Act,⁶ the defendant was convicted on two counts, one of which charged a combination in restraint of interstate commerce, and the other an attempt to monopolize a part of interstate commerce. The same evidence was used in support of both counts, and the defendant objected that but one offense was charged. Each offense, however, could be committed without committing the other. The first count charged merely the formation of a combination for the pur-

¹⁵ *Mactier v. Osborn*, 146 Mass. 399.

¹⁶ *Barrow v. Isaacs*, *supra*.

¹⁷ *Hughes v. Metropolitan Ry. Co.*, 2 App. Cas. 439; *Thropp v. Field*, 26 N. J. Eq. 82; *Lilley v. Fifty Associates*, 101 Mass. 432.

¹ *Com. v. Roby*, 29 Mass. 496.

² *Hans Nielsen, Pet.*, 131 U. S. 176.

³ *Rex v. Morris*, 10 Cox C. C. 480; *State v. Littlefield*, 70 Me. 452.

⁴ See *Harrison v. State*, 36 Ala. 248.

⁵ *Cf. Com. v. Vaughan*, 101 Ky. 603; *Smith v. State*, 105 Ga. 724.

⁶ 26 Stat. at L. 209.

pose of restraining interstate commerce. Though that act might of itself create a monopoly, it might also be so far from achieving that end as to be mere preparation, which is not enough to constitute a legal attempt. The attempt to monopolize obviously need not include the element of combination. Consequently, the objection on the ground of double jeopardy was overruled. *United States v. MacAndrews and Forbes Co.*, 149 Fed. Rep. 836 (Circ. Ct., S. D. N. Y.).

A futile attempt was made to place the above case in that class where one transaction is improperly split up into several crimes of the same kind. Thus, if a man in one transaction steals goods belonging to several different owners, it is possible to form several indictments, each charging the theft of a different article owned by a different person. The ordinary test of identity of offenses — whether the facts necessary to support the first indictment would warrant a conviction under the second — would not prevent a conviction under each indictment. And that is the result reached by some courts.⁷ But it is clear that the state has been injured but once; and where there is only one transaction and one injury to the state, the offenses are identical within the meaning of the double jeopardy guaranty.⁸

PREVENTION OR HINDRANCE BY PROMISEE AS AN EXCUSE FOR NON-PERFORMANCE. — The performance of a contract may be prevented or hindered by the promisee's failure to supply co-operation agreed upon, or by his active interference, intentional or unintentional. Where the promisor's ability to perform depends on some positive act of the promisee, necessary as a prerequisite, the latter's breach of the agreement to co-operate actively so absolutely prevents performance that the defense might well be called impossibility, if the confusing applications of this term had not made use of it objectionable.¹ Clearly the promisor's non-performance should here be excused, whether the promisee's agreement actively to co-operate be express² or implied.³ On the other hand, even when the promisee is under no such obligation, his passive co-operation may be an important element, and if he prevents, hinders or harasses the attempted performance of the promisor, in many situations he may not be entitled to succeed in an action for non-performance. A general theory of defense applicable to this alternative case, however, can be satisfactorily established neither by implying a promise on the part of the promisee to refrain from interfering with the promisor's performance, nor by merely allowing so-called impossibility to excuse.

Should the promisor expressly or impliedly, as in dealings on the stock exchange, assume the risk of absolute prevention⁴ or hindrance⁵ of performance by the promisee, he should, of course, have no defense in the event of such interference. But usually the promisor assumes no such risk.

⁷ *Reg. v. Brettell*, C. & M. 609.

⁸ *Hoiles v. U. S.*, 3 MacArthur (D. C.) 370.

¹ Cf. 19 HARV. L. REV. 462.

² *McKee v. Miller*, 4 Blackf. (Ind.) 222.

³ *Murphy v. Black*, 78 Mo. App. 316; *Atchinson v. Williams*, 28 Tex. 599; *Mackay v. Dick*, 6 App. Cas. 251, 263.

⁴ See *Chicago, etc., Ry. v. Hoyt*, 149 U. S. 1, 14, 15; *Dolan v. Rodgers*, 149 N. Y. 489, 491.

⁵ Cf. *Murdock v. Caldwell*, 10 Allen (Mass.) 299.

When the promisee purposely blocks him so as to make performance impossible, whether this is effected by forcible⁶ prevention or by adversely⁷ controlling or affecting a *sine qua non* of the contract, the promisor should be excused. This is equally so when the complete obstruction is unintentional⁸ or indirect.⁹ When the promisee does not prevent, but purposely hinders¹⁰ performance, so that it is possible only by greater effort or expense, the promisor should again be excused. But when the hindrance is unintentional, it may well be doubted whether, as an inflexible rule, it should excuse the promisor. The necessary exceptions¹¹ can be determined by applying the principle underlying the preceding defenses. It is not a theory of legal interpretation of the contract, nor the limited equitable defense of impossibility, but an extension of equitable defenses at law to include the idea that parties to a contract should be required to deal fairly with each other.¹² When, therefore, the defense of prevention or hindrance is raised by the promisor, the question is not only what were the terms of the contract, but whether, in the particular circumstances, the situation is such that a reasonable man would consider it unfair to the promisor to hold him accountable for non-performance.¹³

A defense of this nature might have been allowed in a recent case where, owing to the negligence of the promisee's representatives, the lease of a quarry, from which the promisor contemplated supplying stone called for under the contract, expired before the promisor could have performed. The court allowed recovery on the ground that performance was not thereby made impossible.¹⁴ *United States v. Conkling & The Fidelity, etc., Co.*, 37 N. Y. L. J. 129 (C. C. A., Second Circ., March, 1907). But a failure to allow a defense on a ground short of impossibility not only may work injustice, as in the present case, but would seem to involve the harsh implication that a promisee may succeed even when he hinders and obstructs the promisor purposely, so long as he does not prevent performance absolutely.

RECENT CASES.

ADVERSE POSSESSION — AGAINST WHOM TITLE MAY BE GAINED — PUBLIC CORPORATION INVESTED WITH TITLE OF PUBLIC SCHOOLHOUSE SITES. — A state statute, framed to establish and maintain a system of free schools, made the trustees of schools of each township a body politic and corporate, and invested it with the title and care of the schools and the schoolhouse sites. The appellee, such a corporation, brought ejectment against the appellant, who had occupied part of a schoolhouse site adversely for more than twenty years. *Held*, that the statute of limitations is a good defense. *Brown v. Trustees of Schools*, 224 Ill. 184.

⁶ *Jarrell v. Farris*, 6 Mo. 159. Under the early common law the promisor was excused only in case of forcible prevention. 1 Rolle Abr. 453 N; Co. Litt. 206 b; *Fraunce's Case*, 8 Coke 89, 92.

⁷ *Connelly v. Devoe*, 37 Conn. 570; *King v. King*, 69 Ind. 467.

⁸ *United States v. Peck*, 102 U. S. 64. For the promisor's right of recovery for loss, see *Peck's Case*, 14 Ct. Cl. (U. S.) 84.

⁹ *Murray v. Kansas City*, 47 Mo. App. 105.

¹⁰ *Taylor v. Risley*, 28 Hun (N. Y.) 141.

¹¹ *Cf. Patterson v. Gage*, 23 Vt. 558.

¹² *Taylor v. Risley*, *supra*.

¹³ See *Anvil Mining Co. v. Humble*, 153 U. S. 540, 552.

¹⁴ *Cf. Fidelity, etc., Co. v. U. S.*, 137 Fed. Rep. 866.

It is well settled that the statute of limitations does not run against the state. In view of this, the sound principle would seem to be that the statute does not run against a municipal corporation when it acts for the state in enforcing rights for the benefit of the general public, in contradistinction to when it acts in a private capacity or for the benefit of a locality. See 15 HARV. L. REV. 846. Similarly, the statute should be held inapplicable to any public corporation performing duties in behalf of the state in the administration of government. See *Simplot v. Chicago, etc., Ry. Co.*, 16 Fed. Rep. 350, 361. When a state adopts a common free school system, a public corporation invested in pursuance of this policy with the title and care of schools and schoolhouse sites would seem to be an auxiliary of the state in the administration of education, and hence a manager of the property for the benefit of the public, though the exercise of its duties may chiefly benefit the inhabitants of a locality. Accordingly, the statute of limitations should not run against it. See *Board of Education v. Martin*, 92 Cal. 209.

BANKRUPTCY — PREFERENCES — STATUTES REQUIRING RECORDING OF TRANSFERS. — A chattel mortgage was given for an antecedent debt by an insolvent more than four months before bankruptcy proceedings, but was recorded within the four months. § 4150 of the Ohio Revised Statutes, 1906, made unrecorded mortgages invalid against creditors. § 60 *a* of the Bankruptcy Act, as amended in 1933, provides that the period of four months does not expire, where the preference consists in a transfer, until four months after the recording, "if by law such recording or registering is required." *Held*, that the Ohio statute "requires" recording within the meaning of the Act. *Loeser v. Savings Deposit Bank & Trust Co.*, 148 Fed. Rep. 975 (C. C. A., Sixth Circ.).

Two cases dealing with somewhat similar statutes held that, since unrecorded transfers were valid between the parties themselves, recording was not "required" within the meaning of the Act. *Myers, etc., Co. v. Pipkin, etc., Co.*, 136 Fed. Rep. 396; *In re Hunt*, 139 Fed. Rep. 283. The court in the present case bases its decision on the other extreme view that recording is "required" whenever necessary to give validity to a transfer as against any class of persons. It is believed, however, that the cases are reconcilable, since in the present case creditors, as well as *bona fide* purchasers, are protected by the recording statute against unrecorded transfers, while by the statutes in the other cases creditors were not; and "required," as used in the Act, may be fairly said to mean "required in order to be good against creditors." It seems proper thus to go behind the *prima facie* meaning of the words of the Act, for, since no statutes make an unrecorded transfer entirely void, any other result would render the provision in the Act of no effect. *Cf. Barlow v. Ross*, 24 Q. B. D. 381. Under this interpretation the present decision seems sound, and its result is supported by authority. *English v. Ross*, 140 Fed. Rep. 630; *First Nat'l Bank v. Connett*, 142 Fed. Rep. 33.

BANKRUPTCY — PROVABLE CLAIMS — GOODS OF OTHER PERSONS IN POSSESSION OF BANKRUPT. — The plaintiff bought goods and left them in the possession of the vendor for purposes of sale. Later the vendor became bankrupt with the goods still in his hands. *Held*, that, though the goods passed to the trustee in bankruptcy by the express words of the English statute, the plaintiff may prove for their value. *In re Button*, 51 Sol. J. 373 (Eng., Ct. App., March 26, 1907).

Though this case comes up under the English Bankruptcy Act, which provides expressly that the title to goods in the order or disposition of the bankrupt shall pass to the trustee, it seems that a similar question may arise in this country under § 70 *a* (5) of our act, which provides that any property which might have been levied on will pass to the trustee. For example, it would seem that in those jurisdictions where the creditors of a conditional vendee are preferred to the vendor, the vendee's trustee in bankruptcy would take title to the goods. So the trustee of an ordinary vendor would take in those states which hold that retention of possession is such conclusive evidence of fraud

that his creditors may have the goods sold. It being clear, then, that the title would pass to the trustee in these instances, the same reasons for allowing the owner to prove would exist here as in England; for the "order and disposition" clause of the English statute and the American law governing conditional vendees and retaining vendors have the common object of preventing fraud, and if the penalty will be mitigated in England to the extent of allowing proof, it might also be done here.

BANKRUPTCY — PROVABLE CLAIMS — UNLIQUIDATED DAMAGES FOR TORTS. — The plaintiffs, having a claim for unliquidated tort damages, sought to liquidate and prove their claim against the defendants' bankrupt estate. They contended that § 63 *b* of the Act of 1898, providing for the proof of unliquidated damages, applied to torts, and that § 17, as amended in 1903, excepting certain tort liabilities from discharge, established this interpretation. *Held*, that the claim is not provable. *Brown & Adams v. United Button Co.*, 149 Fed. Rep. 48 (C. C. A., Third Circ.).

Even before 1903, § 63 *b* gave rise to the view that unliquidated damages for torts could be proved. See *Beers v. Hanlin*, 99 Fed. Rep. 695. But the history of bankruptcy legislation shows that this sub-section refers to provable unliquidated mercantile claims enumerated in sub-section 63 *a*. The first national bankruptcy act of 1800, in order to avoid the harshness of the English bankruptcy laws, which disallowed unliquidated contractual claims, provided in § 58 for their liquidation and proof. *Cf. Ex parte Charles*, 14 East 197. And the later federal acts contained similar provisions. But proof was not extended to unliquidated tort claims in the absence of express statutory provisions. *In re Schuchardt*, 15 N. B. R. 161. This was the better interpretation of the present act prior to the amendment of § 17 in 1903. *In re Hirschman*, 104 Fed. Rep. 69. This amendment, however, by excepting "liabilities" for certain torts from discharge, implies, if "liabilities" includes "unliquidated damages," that unliquidated damages for torts in general are provable, since only provable claims need be excepted from discharge. *Cf. Graham v. Richerson*, 8 Am. B. Rep. 700. But § 17 may be harmonized with the better doctrine of the original act by construing "liabilities" as meaning only liquidated tort liabilities, namely, judgments, which are conceded to be provable claims. *Howland v. Carson*, 16 N. B. R. 372.

BANKS AND BANKING — DEPOSITS — RIGHTS OF DEPOSITOR UPON SUB-DEPOSIT BY DEPOSITARY BANK. — In order to stifle competition, several banks made an agreement by which bank A submitted the highest bid for county funds and thereby secured the deposit. Following out the agreement, bank A deposited a certain part of the county funds received by it with the other banks. Bank A failed. *Held*, that the county may recover the sums on deposit in the other banks in preference to the trustee in bankruptcy of bank A. *In re Blake*, 150 Fed. Rep. 279 (C. C. A., Eighth Circ.).

This decision affirms that of a lower court, commented upon in 20 HARV. L. REV. 140.

BILLS AND NOTES — DEFENSES — TIME GIVEN PRINCIPAL JOINT MAKER. — The defendant signed a joint and several note, intending to become a surety, as the payee knew. The payee made a binding contract with the principal for an extension of time without the defendant's knowledge, and the latter claimed to be discharged. He did not allege that the payee accepted him as surety. *Held*, that he is not discharged. *Vanderford v. Farmers & Mechanics Nat'l Bank*, 66 Atl. Rep. 47 (Md.).

In England the granting of an extension of time by a holder who knew that one maker was only a surety, discharged such surety in equity. *Fentum v. Pocock*, 5 Taunt. 192. By statute the equitable plea is now good at law. *Pooley v. Harradine*, 7 E. & B. 431. In the United States the general rule has been that the surety was discharged at law as well as in equity. See 2 AMES, CAS. ON BILLS AND NOTES, 82, n. 2. But it seems that when courts of law cannot hear equitable pleas the law should not recognize the discharge, since it

is strictly a matter of equity, the surety being legally bound as joint and several maker. New Jersey has followed this strict line of differentiation. *Anthony v. Fritts*, 45 N. J. L. 1. Maryland, also, has not admitted the plea at law, except possibly when the payee has agreed to regard the defendant as surety. *Owings v. Baker*, 54 Md. 82. The Negotiable Instruments Law, adopted in Maryland, makes no provision for the peculiar facts of this case, but seems to leave the law unchanged by providing that a person primarily liable is discharged, *inter alia*, "by any act which will discharge a simple contract for the payment of money." See CRAWFORD, ANN. NEG. INST. LAW, § 200 (4).

CARRIERS — BAGGAGE — LIABILITY FOR LOSS OF BAGGAGE UNACCOMPANIED BY OWNER. — The plaintiff checked trunks on the defendant railroad, intending to follow in person some days later. The baggage was destroyed in the railroad's hands after arrival at its destination. *Held*, that the defendant is subject to greater liability than a gratuitous bailee. *McKibbin v. Wisconsin Cent. Ry. Co.*, 110 N. W. Rep. 964 (Minn.).

The more recent cases have seemed to hold that, in general, the carrier's liability for loss of baggage is that of a gratuitous bailee unless the passenger is on the train with his trunks. *Wood v. M. C. R. R. Co.*, 98 Me. 98; *cf.* 17 HARV. L. REV. 354. But the present decision greatly modifies this sweeping doctrine. In the previous cases the parties checked trunks either without buying a ticket or, if buying one, without intending to use it in the near future. But when the owner intends to follow his trunks, on the same ticket and on the same journey, another question is presented. In this situation it would seem that the carrier should incur full liability. *Chicago, etc., R. R. Co. v. Fairclough*, 52 Ill. 106; *contra*, *Laffrey v. Grummond*, 74 Mich. 186. Under the modern system of travel it will frequently happen that a passenger will not be on the same train with his baggage, especially if the trunks are checked through a transfer company. Similarly, the carrier is held liable if through its fault baggage is checked over a different route. *Isaacson v. N. Y., etc., R. R. Co.*, 94 N. Y. 278. The circumstances may sometimes be such as to hold the carrier liable for the trunk as freight. *Wilson v. Grand Trunk Ry.*, 57 Me. 138.

CARRIERS — DISCRIMINATION AND OVERCHARGE — OFFENSES OF SHIPPERS UNDER ELKINS ACT. — Two indictments lay against the defendant under the Elkins Act. One alleged that, the established through rate for the transportation of petroleum from Olean to Rutland *via* the Pennsylvania Railroad and three connecting carriers being 19 cents per hundred pounds, the defendant accepted a rate of 16.1 cents per hundred pounds for the transportation of petroleum from Olean to Rutland *via* the Pennsylvania Railroad and two connecting carriers. The other indictment alleged that the defendant accepted a rate of 17 cents per hundred pounds for the transportation of petroleum from Olean to Burlington, when it knew that the carrier refused to transport petroleum for competitors from places near Olean to Burlington for less than 33 cents per hundred pounds. The defendant demurred to both indictments. *Held*, that the demurrers be overruled. *United States v. Standard Oil Co. of New York*, U. S. Dist. Ct., W. D. N. Y., April, 1907. See NOTES, p. 635.

CONFLICT OF LAWS — ASSIGNMENT OF CONTRACTS — EFFECT IN FOREIGN STATE OF FAILURE TO RECORD. — A citizen of Michigan, engaged in business there, made in Connecticut an unrecorded assignment of all future book accounts and bills receivable. By Connecticut law assignments of future earnings are not valid against creditors of the assignor unless recorded; by Michigan law no recording is necessary. Bankruptcy proceedings were instituted in Michigan against the assignor. *Held*, that the assignment is valid against creditors. *Union Trust Co. v. Bulkeley*, 150 Fed. Rep. 510 (C. C. A., Sixth Circ.). See NOTES, p. 637.

CONFLICT OF LAWS — TESTAMENTARY SUCCESSION — VALIDITY OF TRUST PERFORMABLE OUTSIDE JURISDICTION OF CREATION. — A testatrix, domiciled in the District of Columbia, devised realty there situated to a New York cemetery company, which was to hold it in trust for certain persons for life, and then

to convert it into securities and to use the income therefrom in keeping a New York cemetery lot in perpetual order. One section of the code of the District of Columbia expressly permits a domestic cemetery association to take and to hold such a gift; but a later section provides that, except for a gift to a charitable use, every future estate shall be void in its creation which suspends the power of alienation beyond prescribed limits. Under New York law the trust could be administered. *Held*, that the provisions in the will are valid. *Iglehart v. Iglehart*, 27 Sup. Ct. Rep. 329.

See, for a discussion of the principles involved, 19 HARV. L. REV. 457; 20 *ibid.* 382.

CONSTITUTIONAL LAW — CLASS LEGISLATION — LEGISLATION AFFECTING ONLY CORPORATIONS. — A statute required that "railroad and other corporations" answer in damages for injuries to employees caused by superior servants. *Held*, that the statute is unconstitutional, because it imposes a burden on corporations different from that on natural persons doing business under the same circumstances, and that it cannot be sustained as an amendment to the incorporation laws, because it is applicable to foreign as well as domestic corporations. *Bedford Quarries Co. v. Bough*, 80 N. E. Rep. 529 (Ind., Sup. Ct.). See NOTES, p. 634.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHTS INFRINGED BY ACTION OF INDIVIDUALS. — The defendants took a prisoner from the custody of state officers and lynched him. They were indicted under a federal statute providing for the punishment of persons who should conspire to prevent or hinder the free exercise or enjoyment by any citizen of any right or privilege secured to him by the Constitution or laws of the United States. *Held*, that the demurrer to the indictment be sustained. *United States v. Powell*, 151 Fed. Rep. 648 (Circ. Ct., N. D. Ala., N. D.).

This case overrules a previous decision by the same court, criticized in 18 HARV. L. REV. 391. The view of the court is unchanged, but it considers itself bound by a dictum of the United States Supreme Court uttered meanwhile. See *Hodges v. United States*, 203 U. S. 1.

CONSTITUTIONAL LAW — POWERS OF JUDICIARY — REFUSAL TO IMPOSE STATUTORY PENALTY. — A statute made it unlawful "to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection." After the destruction of San Francisco, the agents of a steamship about to leave sold tickets to more persons than was permitted. Though the ship's officers exercised due diligence to prevent violation of the law, ticket-holders in excess of the lawful number boarded the ship unnoticed and were not discovered until after sailing. *Held*, that the steamship is not liable for the statutory penalty. *The Charles Nelson*, 149 Fed. Rep. 846 (Dist. Ct., W. D. Wash., N. D.).

The court seems to have considered that, in the extraordinary circumstances under which this voyage was undertaken, it was vested with a discretion to refuse to impose the statutory penalty. But a court can neither extend a statute to meet a situation which it does not include, nor, if the situation fairly falls within the provision, restrict the scope of the statute to avoid injustice. *Stevens v. Ross*, 1 Cal. 94; *The Sam Slick*, 2 Curt. (U. S.) 480. Where the act prohibited is one commonly involving moral turpitude, courts frequently relieve the apparent harshness of penal statutes by interpreting them as requiring that a guilty mind co-exist with the act. *The Queen v. Tolson*, 23 Q. B. D. 168. But that interpretation is not usually made when the statute is in the nature of a police regulation. *People v. Kibler*, 106 N. Y. 321. That it was the legislative purpose to make an absolute prohibition in the present case is shown by the provision giving the Secretary of the Treasury power to remit such penalties. U. S. REV. STAT., § 5294. However, the result in the principal case may be upheld, since the thing forbidden is strictly the act of taking on board, and that act does not seem to have been committed.

CONTRACTS — DEFENSE OF IMPOSSIBILITY — PERFORMANCE PREVENTED BY PROMISEE. — The promisor agreed to supply the promisee with stone which the contract contemplated would be taken from a quarry leased to the promisee, but which was obtainable elsewhere. Owing to the promisee's neglect, the lease ran out before performance was possible, and the promisor was dispossessed. The promisee sued the promisor's surety for non-performance. *Held*, that the promisor was not prevented from performing, and that the surety is liable. *United States v. Conkling & The Fidelity, etc., Co.*, 37 N. Y. L. J. 129 (C. C. A., Second Circ., March, 1907). See NOTES, p. 643.

CONTRACTS — DEFENSES — INCREASED RISKS. — The plaintiffs had agreed to serve as seamen on board a vessel carrying coal, and to go to any port between certain degrees of latitude. At the time of the contract, war had been declared between two foreign powers and coal had been made contraband. On learning that the vessel was bound to a belligerent port, though between the stated degrees of latitude, the plaintiffs refused to continue the voyage, and, on their return home, sued for wages. *Held*, that wages are recoverable down to the date of the judgment. *Caine v. The Palace Shipping Co.*, 23 T. L. R. 203 (Eng., Ct. App., Dec., 1906).

For a discussion of the principles involved, see 19 HARV. L. REV. 462.

CRIMINAL LAW — DEFENSES — JUDGMENT FOR FINE ABATED BY DEATH OF DEFENDANT. — One P. was convicted of giving rebates, and judgment was entered against him for \$6,000 in fines. Subsequently to the judgment P. died. *Held*, that the judgment be declared abated. *United States v. Pomeroy*, U. S. Circ. Ct., S. D. N. Y., Feb. 27, 1907.

There seems to be no direct authority, other than this decision, as to whether, after judgment in a criminal action imposing a fine, the death of the defendant avoids such judgment. It has been held, however, that when a statute makes a penalty payable to the injured party, such payment cannot be enforced by his executor. *Reed v. Cist*, 7 Serg. & R. (Pa.) 183; *cf. Darlington v. Roscoe*, 96 L. T. R. 179. The reason is that the fine is not regarded as compensation, but as a purely personal right to enforce a penalty. This reason should apply equally to the present case. If the fine were regarded as a compensation to the state the defendant's estate should be liable. But the fact that this is a criminal action in which the defendant's guilt must be proved beyond a reasonable doubt negatives this idea, since an action for compensation requires only a preponderance of evidence. Assuming, therefore, that the fine imposed was punitive, since it became impossible to inflict the punishment on the defendant, there would seem to be no reason why the burden should fall on his estate.

CRIMINAL LAW — FORMER JEOPARDY — IDENTITY OF OFFENSES. — The defendant was convicted, under § 1 of the Sherman Anti-Trust Act, of a combination in restraint of interstate commerce, and, under § 2, of an attempt to monopolize a part of interstate commerce. *Held*, that the offenses are not identical. *United States v. MacAndrews and Forbes Co.*, 149 Fed. Rep. 836 (Circ. Ct., S. D. N. Y.). See NOTES, p. 642.

EMINENT DOMAIN — FOR WHAT PURPOSES PROPERTY MAY BE TAKEN — ELECTRIC POWER PLANT. — In an action to condemn land the plaintiff alleged that it had obtained a franchise to supply a certain community with electric light, heat, and power, and that it was necessary to take the property in question in order to perform the service. *Held*, that the complaint sufficiently shows the plaintiff's right to condemn. *Shasta Power Co. v. Walker*, 149 Fed. Rep. 568 (Circ. Ct., N. D. Cal.).

The condemnation of property for other than a public use is unconstitutional. *Matter of Tuthill*, 163 N. Y. 133. It has been held that to constitute a public use the public itself must take control of the property. *Board of Health v. Van Hoesen*, 87 Mich. 533. This doctrine, however, is ordinarily modified by simply requiring that the public be benefited to a sufficient extent. *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694. It is now generally held that

the public derives sufficient benefit from gas or electric lighting plants to justify a municipal bond issue for their erection. *State v. City of Toledo*, 48 Oh. St. 112. There would seem to be no valid distinction between furnishing electric light and furnishing electric power, yet to furnish the latter has been held not to be a public use. *State v. Superior Court*, 42 Wash. 660. If the benefit to the public is so slight as to be inappreciable, as where the power company has agreed to deliver almost its entire output to one individual, it would clearly be right to withhold the power of eminent domain. *Brown v. Gerald*, 100 Me. 351. In the absence of such circumstances, however, the better view supports the present case. *Amoskeag Co. v. Worcester*, 60 N. H. 522; see 15 HARV. L. REV. 399.

EMINENT DOMAIN — NATURE OF RIGHT — INDEPENDENT OR DERIVATIVE TITLE. — The defendant conveyed to the plaintiff with a covenant of warranty against lawful claims of "all persons claiming by, through, or under me." At the time of the conveyance there existed an easement taken by eminent domain proceedings. *Held*, that the existence of the easement is not a breach of the covenant. *Weeks v. Grace*, 80 N. E. Rep. 220 (Mass.).

A title acquired by escheat or forfeiture is derivative. See 4 KENT, COMM., 427. But one conveyed by a tax sale is a new, independent title granted by the state, and not merely the sum of all outstanding claims and estates. See *Hefner v. Northwestern Ins. Co.*, 123 U. S. 747, 751. The right to take property for public use is inherent in sovereignty, and is not dependent on constitutions, which merely qualify the right by providing for compensation. *Sholl v. German Coal Co.*, 118 Ill. 427. The exercise of this right is an action *in rem*, and actual notice to the owner is unnecessary. *Appleton v. City of Newton*, 178 Mass. 276. A condemnation sale in admiralty, also an action *in rem*, conveys a new title. See *Castrique v. Inrie*, L. R. 4 H. L. 414, 428. It would seem to follow that taking under eminent domain is not forcing the owner to transfer his title to the state, but is exercising an independent paramount right, and results in a form of ownership irrespective of any previous title. See *Emery v. Boston Terminal Co.*, 178 Mass. 172, 184. An exercise of the right of eminent domain subsequent to the conveyance is not a breach of even a general warranty, since all property is taken subject to the sovereign power. *Bailey v. Milltenberger*, 31 Pa. St. 37.

EVIDENCE — GENERAL PRINCIPLES AND RULES OF EXCLUSION — ADMISSIBILITY OF TELEPHONE CONVERSATIONS. — A called B's office by telephone, and upon asking for B was told that he was out. After a short time A was called to his telephone, and was told that B had returned and was ready to talk to him. A did not know B's voice. *Held*, that evidence of what A heard the person purporting to be B say is admissible. *Godair v. Ham Nat'l Bank*, 80 N. E. Rep. 407 (Ill.).

A was called to his telephone by a person who purported to be B, but did not recognize B's voice. *Held*, that evidence of what was said to A is admissible. *Kansas City Star Co. v. Standard Warehouse Co.*, 99 S. W. Rep. 765 (Mo., K. C. Ct. App.).

Conversations by telephone are, as a general rule, admissible. See 20 HARV. L. REV. 156. Even when the witness does not recognize the voice of the speaker and there is no independent proof of his identity, the courts have applied this rule when the person answering the witness' call in the usual course of business purports to be the party called. *Guest v. Ry. Co.*, 77 Mo. App. 258; *Oskamp v. Gadsden*, 35 Neb. 7; but see *Kimbark v. Illinois, etc., Co.*, 103 Ill. App. 632. Business custom seems fully to justify this view. But where the witness is called to the telephone, there is nothing on which to rely save the assertion of an unknown person at an unknown place, and hence the probability of fraud is much greater. In such a case, therefore, the evidence would seem to be, not merely of little weight, but too dangerous to be submitted to a jury. This distinction is not noticed in the present Missouri case, and seems never to have been taken, though one case has been found reaching the result its recognition would bring about. *Vaughn v. State*, 130 Ala. 18. In the present Illinois case,

since the reply was substantially in response to the witness' call, the rule applied seems proper.

EXTRADITION — INTERNATIONAL EXTRADITION — EXTRADITION FOR ONE OFFENSE AND IMPRISONMENT FOR ANOTHER. — The relator was accused in one indictment of conspiring to defraud the United States, and in another of procuring the admission of goods into the United States in violation of statute. He was duly convicted and sentenced on the conspiracy charge, and having been released on bail pending an appeal fled to Canada after the affirmation of his conviction. The requisition of the United States was refused. Thereupon he was demanded for the crime charged in the second indictment and was surrendered to the United States. While in the hands of an officer he was arrested on a warrant sworn out on the conspiracy charge, and was imprisoned. *Held*, that the relator is improperly detained. *Johnson v. Browne*, U. S. Sup. Ct., April 8, 1907.

This decision affirms the decision of the lower court, commented upon in 20 HARV. L. REV. 71.

GUARDIAN AND WARD — INVALID APPOINTMENT OF GUARDIAN CONSTRUED AS CREATING VALID POWER IN TRUST. — A testator devised the residue of his estate to his children and appointed guardians of their estates, directing that they should receive, hold, and pay out as guardians all funds and securities belonging to the children. The mother survived the father. The New York Domestic Relations Law gives only the surviving parent the right of appointment of a guardian for the minor children. *Held*, that the will confers on the persons named a valid power to act as a legally appointed guardian would act with respect to the property devised by the father. *Matter of Kellogg*, 187 N. Y. 355.

The Domestic Relations Law confers upon the mother rights respecting minor children equal to those of the father; hence it is clear that the father has no general power to appoint guardians during the life of the mother. *Matter of Schmidt*, 77 Hun (N. Y.) 201. But while, as father, he is thus deprived of authority to designate who shall control the persons or property of his children, as testator his power to dispose of his own property seems unchanged. A common incident to testamentary disposition of property is the designation of how it shall be managed; and persons without authority to appoint guardians may direct who shall control property bequeathed by them to minor children. *Blanchard v. Blanchard*, 4 Hun (N. Y.) 287; aff. 70 N. Y. 615. Even where such a testator specifically purports to name a guardian, the courts have construed the will as appointing the so called guardian trustee of the property devised. *Camp v. Pitman*, 90 N. C. 615; *contra*, *Brigham v. Wheeler*, 49 Mass. 127. The present will, while invalid as appointing guardians, clearly indicates the testator's lawful intention to give the persons designated the control of the residue left the children, and where the intent to create a power is clear, any words, however informal, are sufficient. *Turner v. Timberlake*, 53 Mo. 371.

INFANTS — UNBORN CHILDREN — CHILD EN VENTRE SA MÈRE NOT CONSIDERED BORN IF TO HIS DISADVANTAGE. — A testator devised an estate to A for life, with remainder to A's third, fourth, and every other son successively in tail, but added a proviso that the third or any later son "born in my lifetime" should take only a life estate with remainder over. At the testator's death A's third son was *en ventre sa mère*. *Held*, that he takes an estate tail. *Villar v. Gilbey*, [1907] A. C. 139.

This decision probably firmly establishes in the English law that, except for the purposes of certain rules of positive law, a child *en ventre sa mère* will not be considered born when it would be to his disadvantage. See 16 HARV. L. REV. 601.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — FEDERAL EMPLOYERS' LIABILITY ACT. — The Act of Congress of June 11, 1906, c. 3073, 34 Stat. at L. 232, 233, provided that "every common carrier engaged in trade or

commerce . . . between the several states . . . shall be liable to any of its employees or in case of his death to his personal representative . . . for all damages which may result from the negligence of any of its officers, agents, or employees" *Held*, that the statute is constitutional. *Spain v. St. Louis & S. F. R. R. Co.*, 151 Fed. Rep. 522 (Circ. Ct., E. D. Ark., E. D.).

For a discussion of the constitutionality of this statute, see 20 HARV. L. REV. 481.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — EFFECT OF BILLING ON CHARACTER OF SHIPMENT. — A dealer under contract to supply wheat at Goldthwaite, Texas, in order to take advantage of the low intrastate freight rate in Texas, directed a seller to ship wheat to Texarkana, Texas, a point near the state line. The seller, at the time of shipment, did not know where the grain was to go after it reached Texarkana. Shortly after its arrival the dealer shipped the grain in the original cars under a bill of lading reading from Texarkana to Goldthwaite. *Held*, that this last shipment is not to be considered interstate. *Gulf, C. & St. F. Ry. Co. v. Texas*, U. S. Sup. Ct., Feb. 25, 1907.

When goods are shipped and billed from one state to another, the shipment is interstate throughout, though the last part of the journey may be over a railway entirely in one state. *Cincinnati, etc., Ry. Co. v. Interstate Com. Com.*, 162 U. S. 184. Furthermore, a carrier's business is interstate if he carries goods destined from one state to another, though his carriage is for a part of the journey entirely in one state and under a bill of lading for that part only. *The Daniel Ball*, 10 Wall. (U. S.) 557. It follows that a single shipment, intended to go beyond a state in one journey, is interstate, though it may begin under a bill of lading between two points in the same state. *Houston, etc., Co. v. Ins. Co. of North America*, 89 Tex. 1. In fact, the character of a shipment should be determined by the intent of the shipper, and not, as the reasoning of the present case suggests, by artificial divisions according to the bills of lading. See *State v. Gulf, C. & St. F. Ry. Co.*, 44 S. W. Rep. 542 (Tex.). The result in the present case is therefore right, since the shipper did not know of any further destination when he sent the goods to Texarkana. See *State v. So. Kan. Ry. Co. of Texas*, 49 S. W. Rep. 252 (Tex.).

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — EQUITABLE RELIEF FROM FORFEITURE INCURRED BY BREACH OF COVENANT. — The appellant demised premises to the respondent under a lease providing for the payment of taxes by the lessee and for re-entry by the lessor in case of default. The lessee negligently failed to pay a tax assessment. At the sale of the premises therefor a third party secured a tax title, which was allowed to become *prima facie* irredeemable by the lapse of time. In consequence of a threat by the holder of the tax title to enforce it unless the lessor ejected the lessee, the lessor instituted landlord and tenant proceedings. The lessee, contending that the tax sale was void, sought to enjoin these proceedings so as to be relieved from the forfeiture of his lease. *Held*, that, since the relief asked would involve the lessor in a suit against a *prima facie* irredeemable title, it be denied. *Kann v. King*, 204 U. S. 43. See NOTES, p. 640.

MORTGAGES — EFFECT OF MORTGAGE — LIABILITY OF MORTGAGOR FOR HERIOT. — The plaintiff was lord of a manor in which the defendant's ancestor held a freehold tenement subject to various feudal incidents, including a heriot of the best beast of the tenant at his death. The tenant mortgaged his land but remained in possession and paid the yearly rent. *Held*, that the mortgagor was so seised of the tenement that on his death the lord is entitled to a heriot from him. *Copestake v. Hoper*, [1907] 1 Ch. 366.

A mortgagor at common law does not have legal seisin, for seisin is possession either actual or constructive under a claim of a freehold estate. *Towle v. Ayer*, 8 N. H. 57. Consequently, if the mortgagor had seisin his possession would be adverse, and at the end of the statutory period the mortgagee's rights would be lost, — a conclusion which shows the fallacy of the premise. The

position of a mortgagor is similar to that of a tenant at will. *Moss v. Gallimore*, 1 Dougl. 278. Equity, however, treats the mortgagor as the real owner and the mortgage as a mere incumbrance. *Fairclough v. Marshall*, 4 Ex. D. 37. Thus the mortgagor of a patent right is the "proprietor" of the right and may sue for its breach. *Van Gelder, etc., Co. v. Sowerby, etc., Soc.*, 44 Ch. D. 374; cf. 10 HARV. L. REV. 249. Similarly the owner of an equity of redemption is held to have sufficient seisin to support curtesy. *Casborne v. Scarfe*, 1 Atk. 603; cf. 20 HARV. L. REV. 407. The present case follows these analogies, and, distinguishing a mortgagee not in possession from a trustee who actually manages the property, reaches the equitable result that the mortgagor is the real owner and tenant even for purposes of the incidents of freehold tenancy.

MORTGAGES — TRANSFER OF RIGHTS AND PROPERTY — RIGHTS OF LIFE TENANT BUYING IN AT FORECLOSURE. — A mortgagor devised mortgaged property to the defendant's wife for life, remainder to their children. The mortgage was foreclosed, and the defendant bought in at the sale. *Held*, that presumptively the defendant is a trustee of the property for those in remainder, subject to the life estate. *Griffith v. Owen*, [1907] 1 Ch. 195. See NOTES, p. 639.

PATENTS — INFRINGEMENT — EFFECT OF NON-USER ON RIGHT TO INJUNCTION. — To avoid competition the complainant bought in a patent but made no use of it. *Held*, that nevertheless an injunction be granted against infringement of it. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 150 Fed. Rep. 741 (C. C. A., First Circ.). See NOTES, p. 638.

POLICE POWER — REGULATION OF BUSINESS AND OCCUPATIONS — PROHIBITION OF NIGHT WORK BY WOMEN IN FACTORIES. — A New York statute provided that no female should be employed or permitted to work in any factory before six o'clock in the morning or after nine o'clock in the evening. *Held*, that the statute is unconstitutional. *People v. Williams*, 116 N. Y. App. Div. 379.

The justification for statutes regulating the time or the length of the working day is the right of the state to make regulations for the public health or safety. Whether a particular statute is a reasonable exercise of such right, or is an unwarranted infringement of the constitutional guaranty of liberty and property rights, is a question for the court. *Lochner v. New York*, 198 U. S. 45. In a doubtful case, such as the attempt to limit the working day in mines and smelters to eight hours, the decisions are often in conflict. Cf. *Holden v. Hardy*, 169 U. S. 366; *In re Morgan*, 26 Col. 415. Because of the physical weakness of women and children as a class, restrictions on their work have been upheld which would be unconstitutional if applied to men. Thus, statutes regulating the length of a working day for female employees in factories have generally been held valid. *State v. Buchanan*, 29 Wash. 602; *contra*, *Ritchie v. People*, 155 Ill. 98. But the decision in the present case seems sound, as no evidence was offered showing the injurious effect on women of a reasonable amount of night work in factories.

QUIETING TITLE — BILL BY ONE WHO HAS CONVEYED WITH COVENANTS OF WARRANTY. — The petitioner had conveyed land with covenants of warranty. A levy upon it was threatened under a judgment against a stranger to the title. This judgment antedated the petitioner's conveyance. *Held*, that the petitioner is entitled to equitable relief to quiet title to the land. *Jackson Milling Co. v. Scott*, 110 N. W. Rep. 184 (Wis.).

Bills to remove a cloud on title are allowed, it is true, partly to relieve a plaintiff from the damage that might result to him through difficulty of proof of stale events, or through lack of evidence occasioned by the defendant's undue delay in prosecuting his claim. But that consideration alone is insufficient. There has always been the additional basis of present loss to the plaintiff by a decrease in the marketability of his property. Cf. *Bishop v. Moorman*, 98 Ind. 1. Inasmuch as this second element is here lacking, the present case appears not to

present facts justifying the exercise of jurisdiction to quiet title. *Chapman v. Jones*, 149 Ind. 434. Nevertheless, the great majority of the score or more of cases on this point allow relief to one who, like the present plaintiff, has conveyed his lands with covenants of warranty. *Pier v. Fond du Lac*, 53 Wis. 421; *Styer v. Sprague*, 63 Minn. 414; *contra*, *Chapman v. Jones*, *supra*. This result, which perhaps must be looked upon as representing the law, finds explanation in the disinclination of the courts to allow the grantor's sale to deprive him of a previously existing right to equitable relief, and in their apparent identification of him with his grantee. *Cf. Begole v. Hershey*, 86 Mich. 130.

RES JUDICATA — MATTERS CONCLUDED — ISSUE RAISED BY ANSWER OF CO-DEFENDANT. — The plaintiff and the defendant had been joined as co-defendants in a former action in equity. But in neither the plaintiff's answer in the former suit, which was in effect a prayer for the foreclosure of his mortgage, nor in the defendant's answer, which was in effect a denial of the plaintiff's claim, was the other named; nor was the plaintiff served with a copy of the defendant's answer. The only matter actually litigated seems to have been the plaintiff's present claim, and a decree was entered for the defendant. *Held*, that, in the absence of evidence showing that the question settled by the decree was not in fact litigated, the matter is *res judicata*. *Gulling v. Washoe County Bank*, 89 Pac. Rep. 25 (Nev.).

It is well settled that adverse rights between co-defendants may be effectually determined in equity. *Corcoran v. Canal Co.*, 94 U. S. 741. It can hardly be maintained, however, that a party can be bound by a decree in any case unless it is founded on some pleadings between him and his adversary. But in the present case the pleadings, though not in the form of cross-complaint and denial, should be treated as such because of their substantial effect; and the failure of the plaintiff to object to the absence of the required service amounted to a waiver. *Hapgood v. Ellis*, 11 Neb. 131. The pleadings, therefore, did present an issue, although issue was not formally joined. Taking this view, it is not necessary to adopt the doctrine, vigorously denied by the dissenting judge, that a question which is not directly put in issue by the pleadings may be treated as *res judicata* when the decree purports to settle it. The position of the majority on this point seems unsatisfactory. *Boston, etc., R. R. v. Sargent*, 72 N. H. 455; *House v. Lockwood*, 137 N. Y. 259; but see BLACK, JUDGMENTS, 2 ed., § 614.

RULE AGAINST PERPETUITIES — POWERS — CONTINGENCIES OCCURRING AFTER CREATION OF POWER AND BEFORE APPOINTMENT. — A testator devised to his daughter for life, with testamentary power to appoint to her children or descendants. The daughter appointed by her will to her children for their respective lives, with remainder in fee to their heirs living at their death. All the daughter's children were actually born in the life of the testator. *Held*, that the appointment is invalid for remoteness. *Brown v. Columbia Finance & Trust Co.*, 97 S. W. Rep. 421 (Ky.).

The validity of this power is clear. See GRAY, RULE PERP., 2 ed., § 510. The remoteness of the appointment (which must of course be reckoned from the date of the creation of the power) depends on whether it is to be interpreted and its validity governed according to the circumstances existing at the time of the appointment, when it was clear that all the donees for life were lives in being at the testator's death; or according to the outlook at the creation of the power, when the words here used to indicate those donees would have described a still open class. The principal case in adopting the latter criterion seems incorrect, as well as opposed to the weight of authority. *Morgan v. Gronow*, L. R. 16 Eq. 1; *contra*, *Smith's Appeal*, 88 Pa. St. 492. It is based on the idea that the appointment must be considered in all respects as written into the instrument creating the power. But this rule of thumb should not be given broader effect than the principle it was intended to elucidate, — that remoteness is reckoned from the creation of the power. It is not sensible to prevent the donee from speaking validly in language appropriate to existing conditions, when it is always conceded that the same limitations would be good with the

addition of the stipulation that the occurrence of what had in fact already occurred be a condition precedent to the limitations. See GRAY, RULE PERP., 2 ed., § 518; §§ 517-523 *f*.

SALES — CONDITIONAL SALES — REMEDIES OF SELLER. — The plaintiff made a conditional sale of goods to a company which subsequently went into the hands of a receiver. The plaintiff thereupon filed a claim of lien upon the goods, which was wholly untenable and was dismissed. The goods were then sold to a purchaser having notice of the plaintiff's rights, and the plaintiff brought replevin. *Held*, that he may recover. *Bierce v. Hutchins*, U. S. Sup. Ct., April 8, 1907.

There is some confusion regarding the relations between the various rights of conditional vendors. By the weight of authority, resumption of possession and action for the price are mutually exclusive remedies. *Bailey v. Hervey*, 135 Mass. 172. But, by the sounder view, a right to possession as security is not inconsistent with a right to enforce payment. *Thomason v. Lewis*, 103 Ala. 426. And unsuccessful proceedings for the price may leave the vendor rights in the chattels. *Campbell Mfg. Co. v. Rockaway Pub. Co.*, 56 N. J. L. 676. But a court may conceivably grant both remedies as not inconsistent and still refuse to allow resumption of possession after unequivocal recognition of property in the vendee. *Heller v. Elliott*, 44 N. J. L. 467; but *cf. Child v. Allen*, 33 Vt. 476. Such a decision must depend for support on the ground that certain conduct either amounts to an election of a remedy, or is a waiver of the condition in the contract of sale. The former doctrine, principally relied on by the defendant in the present case, is inapplicable since the attempted remedy was impracticable. *Agar v. Winslow*, 123 Cal. 587. The question of waiver, apparently, was not raised by the parties; though, unless a lien suit is distinguishable from an attachment, a waiver might have been found here. See *Heller v. Elliott*, *supra*.

TAXATION — PARTICULAR FORMS OF TAXATION — STATE INHERITANCE TAX ON EXERCISE OF POWER OF APPOINTMENT. — In 1841 property was settled on a married woman for life, remainder in fee as she should appoint by testamentary deed or will. At her death in 1902 she exercised her power by a will in the form of a deed. The appointee was taxed under the amendment to the New York inheritance tax law of 1897. *Held*, that the tax is constitutional. *Chanler v. Kelsey*, U. S. Sup. Ct., April 15, 1907.

A state may tax the transmission of property by will or descent, because rights of inheritance exist only by its permission. *Magoun v. Illinois, etc., Bank*, 170 U. S. 283. The New York statute imposes such a tax. *Matter of Delano*, 176 N. Y. 486, 494; see also *U. S. v. Perkins*, 163 U. S. 625. The statute applies to the creation of a power of appointment, if by will; but in the present case the creation of the power antedated the statute and was by deed. The statute should not apply to the exercise of the power, because such exercise is not dependent on enabling statutes of inheritance, since appointees take, not under the power, but under the original instrument creating the power. *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61, 77; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 48. It is argued, however, that when the power is exercisable only by the will of the donee, its exercise should be subject to the tax, because its effectiveness depends on a testamentary act. See *Orr v. Gilman*, 183 U. S. 278. But this seems contrary to the elementary principle that the appointee takes by virtue of the original instrument. Moreover, when the appointment, though in the form of a will, is effective also as a deed, it is not dependent on a testamentary act.

TAXATION — PROPERTY SUBJECT TO TAXATION — EASEMENTS. — The appellant, the owner of land in the town of A, had a water right in the town of B, which he used to operate mills on his premises in the town of A. A tax was levied by the town of B upon such water right. *Held*, that it is taxable only in the town of A. *Matter of Hall*, 116 N. Y. App. Div. 729.

It is ordinarily held that an easement, such as the water right in question, is

not taxable real estate. *Borel v. City of New York*, 2 Sandf. (N. Y.) 552; cf. 20 HARV. L. REV. 581. A distinction should be made, however, between taxing an easement and increasing the tax upon real estate because of an easement appurtenant thereto. It is clear that such an indirect tax on an easement is assessable only where the dominant estate is situated. *Boston Co. v. Newton*, 39 Mass. 22. Where incorporeal hereditaments are made taxable by statute, however, such tax should be assessed where the hereditament is geographically located. *Amoskeag Co. v. Concord*, 66 N. H. 562.

TAXATION — WHERE PROPERTY MAY BE TAXED — CHOSER IN ACTION TAXED TO CREDITOR AT DEBTOR'S DOMICILE. — A New York corporation carried on a money-lending business in Louisiana through an agent, the loans being negotiated by such agent and evidenced by notes of the borrowers which were sent to New York and retained by the company until returned to Louisiana for payment. Interest payments were made to the agent and forwarded to the company. A tax was levied by Louisiana upon these obligations as "credits, money loaned, bills receivable," of the corporation. *Held*, that such tax is constitutional. *Metropolitan Life Insurance Co. v. City of New Orleans*, U. S. Sup. Ct., April 8, 1907.

This is a noteworthy decision, in which a tendency evinced by previous cases finds its culmination. As a general rule, ordinary debts have been taxable only at the creditor's domicile. *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300; *Insurance Co. v. Board of Assessors*, 44 La. Ann. 760. But credits represented by some tangible document such as a note or bond are taxable where the document is found. *New Orleans v. Stempel*, 175 U. S. 309. So is an overdraft check employed as evidence of indebtedness. *State Board v. Comptoir Nat'l D'Escompte*, 191 U. S. 388. Moreover, bank deposits are taxable at the place of deposit, irrespective of the existence there of documents representing the debt. *Blackstone v. Miller*, 188 U. S. 189. A New York decision has even permitted taxation of open book accounts at the debtor's domicile. *People v. Barker*, 23 N. Y. App. Div. 524; aff. 155 N. Y. 665. The present decision is foreshadowed also in two possibly distinguishable prior cases. *Bristol v. Washington Co.*, 177 U. S. 133; *Blackstone v. Miller*, *supra*. The ground of these cases is that a course of dealing establishes a "business situs" for the capital invested, and thus protection is furnished by the debtor's domicile. However, they seem wrong on principle: an intangible right can have no situs; the capital involved is taxed in the hands of the debtor; and the only value left is the creditor's increased ability to pay, which should be reached at his domicile.

TORTS — INTERFERENCE WITH BUSINESS — CONTRACT RIGHTS. — The plaintiff supplied phonographic goods to A, who agreed not to sell to dealers on the plaintiff's suspended list. The defendant, who was on the list and knew of the contract, persuaded A to sell to it. The plaintiff sought damages and an injunction to prevent the defendant from procuring any person who had entered into agreements for the sale of the former's goods to break such agreements. *Held*, that, granting the contract is legal, no action lies for procuring its breach. *Nat'l Phonograph Co. v. Edison-Bell Con. Phonograph Co.*, 23 T. L. R. 189 (Eng., Ch. D., Dec. 15, 1906).

It is a fundamental principle, though unfortunately not universally recognized by the courts, that any intentional interference with a contract right by a third person, which results in damage, is *prima facie* actionable. *Lumley v. Gye*, 2 E. & B. 216; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239; see 16 HARV. L. REV. 299. The present case is an attempt to limit that doctrine to certain classes of contracts. The opinion does not make clear whether the attempted distinction is between contracts for personal service and all others — a distinction taken by some American courts, — or between affirmative and negative contracts. In either case it is without justification, as the essential characteristics of the right infringed are the same. *Angle v. Chicago, etc., Ry.*, 151 U. S. 1; *Beekman v. Marsters*, 80 N. E. Rep. 817 (Mass.); see 16 HARV. L. REV. 228. The court was, perhaps,

influenced by the tendency of recent English legislation to limit the liability for interference with contract rights by providing that interference with contracts of employment, if done in furtherance of a trade dispute, shall not be of itself illegal. 6 EDW. 7, c. 47. The doctrine as it now stands in England, weakened by statute and decision, is practically useless. This result is to be deplored, since contract rights should be as zealously guarded by the courts as property rights.

TRUSTS — CREATION AND VALIDITY — NOTICE TO CESTUI QUE TRUST. — G. purchased certain bonds, orally declared that he held them in trust for the plaintiffs, then infants of tender age, and informed the plaintiffs' father of the trust, but gave no notice to the plaintiffs personally. *Held*, that a valid trust has not been created. *Boynnton v. Gale*, 80 N. E. 448 (Mass.).

As it is impossible, except by sealed instrument, gratuitously to transfer legal title to property which has not left the possession of the owner, similarly it should be impossible to create an equitable interest in such property without consideration. Voluntary declarations of trust, however, at least in the case of personalty, have been treated almost universally as effectual to create valid trusts. *Ex parte Pye*, 18 Ves. Jr. 140. The Massachusetts court has qualified that doctrine by adding the requirement that notice of the trust be given the beneficiary. *Clark v. Clark*, 108 Mass. 522. This limitation probably originated in a demand for such notice as evidence of the settlor's intent to create a trust. See *Brabook v. Boston Bank*, 104 Mass. 228. But the courts have considered the notice necessary as something equivalent to the delivery required to perfect gifts at law. See *Bailey v. New Bedford*, 192 Mass. 564. If these things were truly equivalent, it would seem that notice to the parent would be as effectual as the delivery of a chattel to a third person for the donee. See *Duryea v. Harvey*, 183 Mass. 429. The principal case shows a tendency to enforce the requirement of notice very strictly, which results in bringing the law of equitable gifts more nearly into harmony with that applied to legal gifts.

TRUSTS — FOLLOWING TRUST PROPERTY — CESTUI'S RIGHTS TO PROPERTY LOST IN BUCKET SHOP. — A trustee lost the trust funds by speculating in a bucket shop, no property being bought or sold. The *cestui que trust* brought a bill to recover the property from the proprietors of the bucket shop. *Held*, that the defendants gave no lawful consideration and must return the property to the plaintiff. *Joslyn v. Downing, Hopkins & Co.*, 150 Fed. Rep. 317 (C. C. A., Ninth Circ.).

To speculate on the differences between present and future prices without actually buying any property is a gambling transaction, and it is established in the United States that a contract so to speculate is void as against public policy. *Irwin v. Williar*, 110 U. S. 499. The courts will not, in the absence of a statute, aid either party. *Harper v. Crain*, 36 Oh. St. 338; *Harvey v. Merrill*, 150 Mass. 1. But in the case under discussion the plaintiff was *cestui que trust* and ignorant of the transaction. Since, then, the parties were not *in pari delicto*, the defendants could only retain the property, if traceable, on the argument that they were *bona fide* purchasers for value. Whether or not they gave value for the property, they can hardly find refuge in their *bona fides*, for they obtained the property by a method inconsistent with a clean conscience. Although they were ignorant of the existence of the trust, they knew that the transaction was legally invalid. There seems no reason why the doctrine of *bona fide* purchaser should protect a defendant who acquires the property by unlawful methods, although without knowledge of equities.

WATERS AND WATERCOURSES — TIDAL WATERS — PURPRESTURE. — A riparian owner built a pier beyond high-water mark without permission from the state. It was admitted that the pier was not a nuisance. *Held*, that it cannot be removed as a purpresture. *Town of Brookhaven v. Smith*, 188 N. Y. 74.

By the old law any structure beyond high-water mark was removable as a purpresture, — that is, an invasion of the crown's private property in the bed of a tidal stream. *Att'y-Gen'l v. Richards*, 2 Anstr. 603. This was changed in

most of the original states, either by statute or by usage, even before the Revolution. See GOULD, WATERS, 3 ed., §§ 169 ff. In other jurisdictions, abandoning the old law, it is said that the state holds the *jus privatum* in trust for the public, who derive benefit from the erection of wharves. *People v. Mould*, 37 N. Y. App. Div. 35. Another view is that the littoral owner has an interest in the beach, including the right to wharf out. *Tuck v. Olds*, 29 Fed. Rep. 738. But this right is always subject to state regulation. *Lincoln v. Davis*, 53 Mich. 375. The present case seems to state the best reasons for departing from the old rule. It holds that the right to wharf out is a necessary part of a right of access to navigable water, and that the purpresture doctrine, since it would be a great hindrance to commerce, is inapplicable to American conditions. The doctrine, however, is still recognized by some courts. *Shively v. Bowlby*, 152 U. S. 1.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE FEDERAL POLICE POWER. — In these days of federal activity there are no questions of more vital interest than those relating to the ramifications of the power of Congress to regulate commerce. The constitutional aspects of proposed legislation are considered by Edwin Maxey in a recent article. *The Constitutionality of the Beveridge Child Labor Bill*, 19 Green Bag 290 (May, 1907). The bill discussed proposes to prohibit carriers of interstate commerce accepting from the operators for transportation the products of any factory or mine in which children under fourteen years of age are employed, and to impose penalties on both carrier and operator for violation of the provisions. The writer contends that as the regulation is directed to operate upon processes of production which are completed before distribution begins, it is not regulation of commerce within the decisions of the Supreme Court, but rather a regulation of manufacture or mining. It is his conclusion that such a measure could only be sustained as an exercise of the police power of the federal government.

The courts of sixty years ago would have been startled at the use of the phrase "police power" in such a connection. In its origin this term was used to denote the residuum of undefined powers vested in the state governments.¹ In its later use it seems to indicate a class of powers of government directed particularly toward the conservation of the public health, morals and other interests which closely concern the well-being of the state, — powers so important that the written constitutions of state and nation are carefully construed to give them the greatest possible latitude. It is on the existence of such powers in the federal government that the writer conceives the constitutionality of this proposed legislation to depend. That the Supreme Court considers that it has some such power is not open to doubt. The strongest utterance on the subject was the *Lottery Case*,² where the court in justifying prohibition of interstate commerce said: "As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the wide-spread pestilence of lotteries, and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another." A former decision of the court seems to indicate the source of this power, the concept being, apparently, that a grant of power to the federal government carries with it a right to use that power for the protection of the public in the same manner that the state itself might have used it had the power been retained.³

¹ See *Police Power of the State*, 39 Proc. Am. Phil. Soc. 359; What is the Police Power?, 7 Colum. L. Rev. 322.

² 188 U. S. 321.

³ See *In re Rapier*, 143 U. S. 110.

If that is the true basis of the doctrine, there seems no limit, aside from express constitutional limitations, to the power of Congress to use the machinery of interstate commerce regulation for the protection of national interests. In view, however, of the strong dissent in the Lottery Case,² it may be doubted whether the court would carry the principle to its logical conclusion. Certainly the health of the community is of no less interest to the government than its morals. The broad principle involved, moreover, seems to admit of no division on the ground that the proposed legislation is directed to the protection of those who might deal with the goods before distribution, rather than of those into whose hands they might come through interstate transportation.

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- ANALYSIS OF THE LEGAL VALUE OF A LABOR UNION CONTRACT, AN. *Frank W. Grinnell*. Dealing with "closed shop" and "arbitration" agreements. 41 Am. L. Rev. 197. See 18 HARV. L. REV. 423, 444.
- APPELLATE JURISDICTION. *Everett P. Wheeler*. Its abuse, particularly under narrow New York rulings. 7 Colum. L. Rev. 248.
- CHILD EN VENTRE SA MÈRE. *Anon.* Discussing under what circumstances a child *en ventre sa mère* is in law treated as born. 51 Sol. J. 354. See 20 HARV. L. REV. 651.
- COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION AND TWO RECENT CASES DEALING WITH IT, THE. *S. S. Gregory*. Discussing the Federal Employers' Liability Act. 5 Mich. L. Rev. 419. See 20 HARV. L. REV. 381.
- CONSPIRACY AS A CRIME AND AS A TORT. *Francis M. Burdick*. 7 Colum. L. Rev. 229.
- CONSTITUTIONALITY OF THE BEVERIDGE CHILD LABOR BILL, THE. *Edwin Maxey*. 19 Green Bag 290. See *supra*.
- CONTRACTS FOR SALE BY TRUSTEES. *Anon.* Considering the effect in England of a defect in the trustee's power to sell, upon a contract to sell land. 51 Sol. J. 302.
- "CUJUS EST SOLUM EJUS EST USQUE AD CÆLUM." *S. Varadachari*. Discussing the right of the owner of a cornice that projects over another man's land to the air space occupied by the cornice for the period of the statute of limitations. 17 Madras L. J. 1. See 19 HARV. L. REV. 369.
- DEFECTS OF THE ARMSTRONG COMMITTEE'S LEGISLATION RELATING TO THE DIVIDENDS OF MUTUAL LIFE INSURANCE POLICY HOLDERS. *Samuel B. Clarke*. 41 Am. L. Rev. 161.
- DOCTRINE OF COMMON EMPLOYMENT IN ENGLAND AND CANADA, THE. II. *J. P. McGregor*. 6 Can. L. Rev. 24, 61, 110.
- EVOLUTION OF THE LAW OF TRADE UNIONS, THE. *John H. Romanes*. 23 Scot. L. Rev. 73.
- EXECUTIVE JUSTICE. *Roscoe Pound*. Pointing out the modern tendency to allow greater freedom to summary executive action. 55 Am. L. Reg. 137.
- EXEMPTION OF PRIVATE PROPERTY AT SEA FROM CAPTURE IN TIME OF WAR, THE. *Sir William R. Kennedy*. Advocating an amendment of the Declaration of Paris in order to bring within the exemption all private property. 16 Yale L. J. 381.
- IN MEMORIAM: *FREDERICK WILLIAM MAITLAND*. *O. W. Holmes, John C. Gray, R. Saleilles, Paul Meyer, Heinrich Brunner, F. Liebermann, Joseph Redlich, A. Zocco-Rosa*. 23 L. Quar. Rev. 137.
- JAPANESE SCHOOL INCIDENT AT SAN FRANCISCO FROM THE POINT OF VIEW OF INTERNATIONAL AND CONSTITUTIONAL LAW, THE. *Theodore P. Ion*. 5 Mich. L. Rev. 326. See 20 HARV. L. REV. 337.
- LEGAL STATUS OF THE PANAMA CANAL ZONE, THE. *Charles R. Williams*. 15 Am. Lawyer 125.
- OPTION-CONTRACT Q'ANDARIES IN ILLINOIS LAW, SOME. *George Packard*. A consideration of the legality of board of trade transactions at common law and under the Illinois statutes. 1 Ill. L. Rev. 571.
- OPTIONS TO PURCHASE THE FEE SIMPLE IN LEASES. *Anon.* Criticizing two recent English cases. 51 Sol. J. 319. See 20 HARV. L. REV. 240.
- POSSESSION AND OWNERSHIP. I. *Albert S. Thayer*. Discussing the fundamental nature of these rights. 23 L. Quar. Rev. 175. See 3 HARV. L. REV. 23, 313, 337; 18 *ibid.* 196; 20 *ibid.* 563.
- POWER OF APPELLATE COURTS TO CUT DOWN EXCESSIVE VERDICTS, THE. *Robert L. McWilliams*. 64 Cent. L. J. 267.

- PURCHASER AT SHERIFF'S SALE: WHEN A TRUSTEE. *Roland R. Foulke*. A summary of the law of Pennsylvania on this point. 55 Am. L. Reg. 147.
- REASONABLE TIME IN THE PERFORMANCE OF CONTRACTS. *Anon.* Maintaining that the question of reasonable time is for the jury. 64 Cent. L. J. 245.
- SPANISH OBJECT-LESSON IN CODE-MAKING, A. *Charles Sumner Lobingier*. 16 Yale L. J. 411.
- STATUS OF FOREIGN CORPORATIONS AND THE LEGISLATURE. I. *E. Hilton Young*. 23 L. Quar. Rev. 151.
- SUGGESTIONS ON THE PROPOSAL TO ENACT THE "UNIFORM NEGOTIABLE INSTRUMENTS LAW" IN ILLINOIS, SOME. *Julian W. Mack*. 1 Ill. L. Rev. 592.
- TRUE REMEDY FOR LYNCH-LAW, THE. *Hannis Taylor*. Advocating the Virginia modification of the American system of criminal procedure. 41 Am. L. Rev. 255. See 17 HARV. L. REV. 317.
- UNIFORM LAW RELATING TO ANNULMENT OF MARRIAGE AND DIVORCE. *Walter George Smith*. 64 Cent. L. J. 229.
- WILL OF AN ENGLISH GENTLEMAN OF MODERATE FORTUNE, THE. *Albert Martin Kales*. Suggestions for making valid dispositions. 19 Green Bag 214.
- WRITS OF ERROR AND APPEALS FROM THE NEW TERRITORIAL COURTS. *Howard T. Kingsbury*. Discussing especially remedies for obtaining review of the decisions of the Philippine Supreme Court. 16 Yale L. J. 417.

II. BOOK REVIEWS.

MODERN BUSINESS CORPORATIONS, including the Organization and Management of Private Corporations, with Financial Principles and Practices, etc. By William Allen Wood. Forms of Procedure illustrative of the Formation, Organization, Operation and Consolidation of Corporations, written or selected by Lewis B. Ewbank. Indianapolis: The Bobbs-Merrill Company. 1906. pp. xi, 358. 8vo.

It is often difficult to determine the exact field of usefulness of a book treating a legal or partly legal subject. The present work is not strictly a text-book of corporation law, nor is it peculiarly useful to the business man. It is not technical enough for the lawyer and is too technical for the layman. Perhaps the ideal purpose of this book would be as the basis of a course to instruct students concerning some of the fundamental principles of modern business. The author has certainly included many things in the book of which the average lawyer may be ignorant, but whenever the practical lawyer is called on to deal with such questions, he will be forced to learn them far more thoroughly than any summary from a text-book can teach him, if he desires to give efficient service to his clients.

The first half of Mr. Wood's book is neither as interesting nor as useful as the last. It is principally devoted to the organization of a corporation and contains little that is new to the lawyer. Yet the author is too wise to attempt to instruct a layman in order that he may form his own corporations without legal aid. The second half of the book is more interesting, as it is more technical. The first chapter on corporate book-keeping is valuable and interesting, and is followed by a number of useful forms. The remainder of the book is comprised of miscellaneous information concerning the size of corporations, distribution of corporate wealth, unintelligent competition, etc. Among these miscellaneous articles the author has included one on trusts and voting trusts. He introduces this by a statement that since combination in the form of a trust has been declared illegal, a trust no longer exists in this country. By a parity of reasoning, every form of monopoly is now non-existent in the United States, a truly happy deliverance.

The legal principles enunciated by the author are, however, generally unexceptionable. Perhaps he may be a trifle too certain of the validity of voting trusts, as the entire question is doubtful. We would suggest, however, that one correction be made. On page 299 he states that if a foreign corporation is involved in a suit exceeding \$2000.00, it may remove the cause to the United

States court from the court of the state. This statement should be qualified, at least, by noticing the prevalence of state statutes, providing that if a corporation removes a suit to the federal courts it shall thereafter forfeit its right to do business in the state. Such statutes, having been held constitutional, tend to destroy the value of foreign corporate organization.

In conclusion, it is believed that Mr. Wood has written an interesting and original book. Its limitations, as pointed out above, are those of necessity, as it is too short to be a working book for a lawyer. It contains, however, much interesting material not often treated in the ordinary work on corporations.

R. M.

THE DECLARATION OF INDEPENDENCE: ITS HISTORY. By John H. Hazelton. New York: Dodd, Mead & Company. 1906. pp. 629. 8vo.

"This work is offered to the American people not only in the hope that it may be welcomed as a readable and reliable history of the Declaration of Independence, but in the hope that it may in some degree tend to keep alive in their hearts the love of Liberty that possessed the Fathers." The foregoing quotation from Mr. Hazelton's preface provides a ready-made text for an estimate of his success.

The book on the whole is very readable. The opening chapter is concerned with the events of 1774, the year of the first meeting of delegates from the colonies in Philadelphia, and the succeeding chapters conduct the reader through the months of ever-increasing excitement to the culmination of the signing of the Declaration and its immediate effects. The gradual development of the spirit of independence is admirably depicted. The text is almost entirely composed of extracts from contemporary letters and at times is incoherent, but the interest of the actual words of the protagonists more than offsets the unpleasant effect of the patchwork. A hindrance to enjoyment in reading is the insertion of unnecessarily obtrusive key letters before each quotation.

The appendix and notes, which make up half the bulk of the work, lay bare such a wealth of original sources as to inspire confidence in the reliability of the history. In the appendix are given, among other things, seven varying drafts of the Declaration. The notes considerably elaborate the text, and present disputed questions fairly from all points of view.

Mr. Hazelton's further hope should be equally well realized. It must be a sluggish temperament that does not quicken under the spell of the simply told great purposes of these men who were equal to their task. This narrative of the accomplishment of their highest desires is of all the more stimulating interest because of the disclosure through their own letters of their common humanity.

THE GRAND JURY, Considered from an Historical, Political, and Legal Standpoint, and the Law and Practice Relating Thereto. By George J. Edwards, Jr. Philadelphia: George T. Bisel Company. 1906. pp. lxxix, 210. 8vo.

The grand jury is at the present day coming more and more into prominence. Of late it has excited public interest as the agency through which the corruption of public officials has been investigated, and by means of which prominent offenders against the federal statutes concerning interstate commerce have been brought to justice. In at least one state it has attracted attention by a persistent refusal to indict certain persons who were singled out for prosecution for minor technical offenses by a somewhat over-zealous district attorney. Accordingly, the publication by Mr. Edwards of a book treating of the grand jury at once from a historical, political, and legal standpoint, is a timely one.

Probably the most interesting chapter in the book is that upon the origin, history, and development of the grand jury, which contains an account of the growth of the institution from the time of its earliest beginnings prior to the Norman Conquest down to the period at which it assumed its present powers, organization, and functions. In the writing of this chapter the author has

availed himself freely of the investigations of others. In fact, he makes no claim that his conclusions are based upon original research upon his part. His treatment of the material so combined from various sources is intelligent and coherent, evidencing considerable thoroughness of analysis and reflection.

The other three chapters have to do with the existing law relating to the organization of the grand jury, its powers and duties, and the transaction of its business. While they are less interesting to the general reader than the first chapter, they provide a convenient summary of legal principles for the use of the district attorney or the lawyer engaged in the trial of criminal causes.

H. LEB. S.

THE PREPARATION AND CONTEST OF WILLS, with Plans of and Extracts from Important Wills. By Daniel S. Remsen. New York: Baker, Voorhis & Company. 1907. pp. xli, 839. 8vo.

The ideals of the legal treatise and the legal manual are utterly diverse. The first must decide the effect of irretrievable facts, the second has the ordering of future action toward a desired end; one discusses results, the other causes. The present volume is a worthy example of the latter class. Since it is the duty of the author of such a work to avoid difficult questions of law, to keep so far from the edge of the precipice that its exact location does not greatly concern him, it is perhaps not so high a form of legal authorship as the other. It requires, however, what text-writing does not, — the power to foresee practical difficulties and to overcome them. This volume will be useful because it does show this fruit of experience, and because, while every man has access to the cases on which a manual is founded, no one but the man himself can impart what experience has taught him. Such a book must suggest and compare the possible ways of accomplishing definite testamentary objects, must direct attention to all collateral circumstances that need consideration, and must warn the reader as to words which he might naturally use, but which cases show to be productive of uncertainty. These tasks are here well performed, and with no stint of labor. It is only to be regretted that in some cases the very exhaustiveness as to detail has been allowed to crowd out the statement of underlying reasons necessary for intelligent application of principles.

More than one-third of the book is devoted to extracts from important wills, and a close connection is preserved between the abstract statements of the text and the great variety of actual applications. The collection is further worth while because it gives in a convenient shape what is otherwise practically inaccessible. The correlation of principles and practice is aided by an index which reasonably fulfills the requirements not only to direct the searcher to what he wants to find, but to remind him of what he has failed to consider. R. N. M.

THE MECKLENBURG DECLARATION OF INDEPENDENCE. A Study of Evidence Showing that the Alleged Early Declaration of Independence by Mecklenburg County, North Carolina, on May 20th, 1777, is Spurious. By William Henry Hoyt. New York and London: G. P. Putnam's Sons. 1907. pp. xv, 284. 8vo.

THE LAW OF HOMICIDE. By Francis Wharton. Third Edition, by Frank H. Bowlby. Rochester: The Lawyers' Co-operative Publishing Company. 1907. pp. clvi, 1120. 8vo.

ILLINOIS CIRCUIT COURT REPORTS. Reports of Cases Decided in the Circuit, Superior, Criminal, Probate, County and Municipal Courts in Illinois, Including Unreported Decisions in the Supreme Court. Vol. I. Edited and Annotated by Francis E. Mathews and Hal Crumpton Bangs. Chicago: T. H. Flood and Company. 1907. pp. xviii, 698. 8vo.

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